

**Physical Access for Persons With Disabilities:
Their Key to Citizenship**

by

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Abstract

For persons with disabilities, the activities that able-bodied people take for granted can be major, often insurmountable challenges. Attempting to enter a restaurant for lunch with friends can result in lengthy and adversarial litigation if the facility is not accessible to a person with a disability or other mobility impairment. This litigation would be initiated after the individual was effectively refused service; a refusal based on his/her personal physical characteristics. If a shopping mall is not equipped with "access amenities", then the disabled person may be excluded from shopping there and thus exercising consumer freedom. If workplaces are not equipped to accommodate the access needs of persons with disabilities, then those people are effectively barred from gainful employment there. If a municipal government building is inaccessible to disabled persons, then they may be excluded from participating in council meetings. These are all activities that the majority of the population enjoys as a matter of course, in that they represent the functions of a free citizen in a free society.

If a person is excluded from such activities because of some personal characteristic, then that person is subjected to differential or discriminatory treatment. The guarantees provided in Canadian federal and provincial rights legislation, are such that people are not to be discriminated against. Where buildings and facilities otherwise open to the public are not accessible for persons with disabilities, then those people are being discriminated against. To challenge these discriminatory practices, individuals initiate

complaints through the administrative justice system.

To address the extent to which this is a problem, many sources were consulted. Constitutional lawyers, tribunal members, advocates for the disabled and land use planners were interviewed. Case law and legislation were reviewed. Literature on citizenship theory, dispute resolution and dispute avoidance was compiled and assessed. And, the field of land use planning was analyzed (drawing on the writer's educational and experiential background) as a possible alternative method for effecting systemic access for persons with disabilities.

The conclusion of this study is that there does exist a proactive method for assuring access, a method that can apply the systemic remedy needed to deal with this problem. The current method, which is an adversarial and piecemeal complaint process, has proven ineffective in remedying this discrimination problem. Failure to provide an appropriate remedy means that persons with disabilities will not enjoy the degree of citizen status enjoyed by the able-bodied. This is the current circumstance, and since equity is the aim of rights legislation, and since such legislative and administrative frameworks have failed in that purpose, then an alternative method is necessary.

An alternative model is the one in which land use planning is based. It has conflict avoidance and conflict minimization as underpinnings. And, most importantly, land use planning is already a proven method of combatting discrimination.

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Preface

When the writer began this study, the subject matter was pursued as part of an interest in identifying a better administrative and adjudicative framework for addressing the issue of physical access for persons with disabilities. Essentially, it was seen as an exercise in implementation as opposed to theoretical considerations surrounding the question of why assure physical access for persons with disabilities. Other than the writer's simplistic view that "access" is the right thing to do, there had been no consideration given as to why "access" should be assured.

However, after having considered various writings on issues of citizenship and personal freedoms, the implementation focus of the study was seen as the means to the end of full citizenship for persons with disabilities. Efforts aimed at achieving that end have fallen short. Full citizenship includes exercising choices regarding participation in society. To explain,

One obvious way to promote active citizenship is to remove barriers to participation. It may be regrettable that so many of our citizens lack the desire to participate, but it is a great injustice if those citizens who want to participate are prevented from doing so by social economic or cultural barriers.

This was one of the central concerns of the recent British Commission on Citizenship, whose report Encouraging Citizenship was released in 1990. It listed seven barriers - [including] ...social disadvantage, poverty, bad housing, unemployment, religious, racial and sexual discrimination, physical and mental disability and ill health, and the need to care for a dependent member of the

family - administrative complexity in the provision of social entitlements - lack of accountability of public agencies.¹

The barriers identified in Britain are equally applicable to Canada, and Ontario, as will be seen. Further, there are various ideological bases for what constitutes full citizenship. Republican views of citizenship entail political activity (e.g. civic functioning), while modern liberal views are more concerned with the social and economic elements of citizen participation (e.g. employment, housing, education).

The key in the entire debate over how persons with disabilities are able to enjoy citizen status, in either the republican or modern liberal perspective, is that the barriers are equally problematic. While this may be partly because the "group" defies cohesive definition (i.e. unlike groups defined by nationality, religion or gender), the more important reason is that while physical access has been made an important equity principle, it has not become an implementation imperative.

The justifications for assuring access go beyond citizenship issues, but it was the arguments concerning citizenship that made the application of such principles to the "access" question the true learning experience for the writer, during this study.

¹ Kymlicka, Will, Recent Work in Citizenship Theory, (Ottawa, Multiculturalism and Citizenship Canada, September 1992), p.43.

Introduction

The public and judicial administration fields are currently undergoing considerable changes. The pressures for change include constrained fiscal resources, the application of new technology, and a public agenda that includes "doing more with less". While this means that governments may move to divest certain public administration functions through privatization, contracting out of services, or in "partnerships" with the private or volunteer sectors, there are certain governmental functions that are not well suited to such solutions. These include the administration of justice, especially where the enforcement of constitutional rights is concerned. Therefore, we are left with the task of trying to identify more effective and/or more efficient methods of delivering justice services.

To attempt to provide an analysis of the entire field of judicial (and quasi-judicial) administration, with an aim to consider ways of doing more with less (within the myriad issues being adjudicated), would be onerous. However, it is intended that examining a specific application of rights law will provide some insight into how justice services may be delivered in ways that are responsive to larger trends.

This study was approached consistent with the following statement;

... Human rights are a special class of moral rights that are fundamental and inalienable and cannot be overridden by any other rights. Understanding of human rights tends to be expansive and proactive; inclusive rather than exclusive. They are deemed to create a right to something - an entitlement

that becomes most obvious when they are being denied or ignored... In theory at least, contemporary democratic governments have recognized their responsibility to work for conditions under which all citizens can realize their human rights.²

The major premise of this thesis is that within the administrative justice system (in Ontario and elsewhere), there is considerable room for reforms that enhance effectiveness and efficiency. This will be demonstrated by reviewing a particular rights issue, namely assuring physical access for persons with disabilities, in terms of present methods of assuring the right and alternative ways of doing so more effectively, cost-efficiently, while respecting the dignity of the individual.³ Specifically it will be argued that there exists, within existing legislative and judicial regimes, a more cost-efficient, effective and dignified method of assuring the constitutionally-prescribed right of physical access for persons with disabilities (i.e. "access"). Realizing such a change requires that there must be a shift from the existing confrontational and reactive method of resolving such conflicts to a method that avoids the conflict. This can be achieved by utilizing a proactive approach to addressing the problem. This rights issue is effectively the catalyst for examining the possibility for employing more efficient public policy implementation strategies.

² Rosen, Young and Young, *Human Rights and Democracy: The Role of the Commonwealth*, (Ottawa, October 1992), pp. 2,3.

³ Human Rights Code, R.S.O. 1990, Chapter H.19, Preamble

The thesis is organized into six chapters. The first chapter provides a brief overview of citizenship theory. This is presented at the outset, in order to reflect the writer's view that without assured physical access, the citizenship issues which able-bodied people take for granted or debate with philosophical zeal, are all non-considerations for persons with disabilities. Citizen status assumes the physical access required to be a participating citizen.

The second chapter provides an overview of the administrative justice system, including an assessment of why and in respect to what types of issues it is used. Trends affecting the administrative justice system will also be covered in order to assess the pressures for change. One such trend, which is of particular importance to this study, is the movement toward Alternative Dispute Resolution (ADR).

The third chapter concentrates on the concept of ADR, including its application in legal and other social processes. Applications include arbitration, mediation, negotiation and "dispute avoidance". The discussion of a particular dispute avoidance concept (i.e. land use planning) will also be presented in this chapter, for two reasons. Land use planning applications have proven to be successful in dealing with potential disputes, and, it is a methodology already well established in Ontario.

In Chapter 4, the access problem will be outlined in detail. This will include an assessment of access as an issue of discrimination, theories of equality versus equal

treatment (and the current practical considerations surrounding both), and the various justifications for assuring access for persons with disabilities. The thesis will review philosophical considerations surrounding physical access (eg. is it a right or a privilege? how does lack of physical access impact on one's realization of full citizenship?). Access to employment, housing and various services and facilities are all provided for in applicable legislation, and in the *Charter of Rights and Freedoms*.

Chapter 5 provides a review of the manner in which access issues are currently addressed in legislation in Ontario and other jurisdictions, and how such legislation may or may not be effective (or cost-efficient or dignified) in remedying access problems in a systemic fashion. This will be aided by a review of case law in this area. It may be that the current system, which is a complaint-based process applying traditional conflict resolution methodologies (i.e. tribunals, courts) is the best that we can design, but this is unlikely. The current approach(es) offer incrementalist and limited remedies, largely because of the reactive nature of the conflict resolution strategies. The hypothesis is that by utilizing a proactive avoidance methodology, such as that present in land use planning, access can be remedied systemically.

After the philosophical considerations and review of existing mechanisms, the assessment will move to consider "alternative" mechanisms that exist or could be devised for dealing with physical access considerations. The sixth chapter assesses the application of a proactive approach to addressing the access issue. Land use

planning, a field concerned with dispute avoidance or minimization, is an area that is very conducive to proactively addressing access problems, even though it may seem to many observers that land use planning and rights issues are very different matters.

The concluding chapter will suggest how the analytical process used in this study could be applied to other conflict areas as a means of responding to the pressures currently affecting the administration of justice.

A good deal of the literature secured in preparation of this study was in the form of periodicals, especially as relates to the issue of access. This reflects the topical and timely nature of this problem. Research also involved considerable review of legislation, both existing and proposed, and discussions with a variety of persons (see Appendix A), including land use planners, constitutional lawyers, advocates for the disabled, and administrative justice practitioners (e.g. tribunal chairpersons). The writer also relied on his own educational and experiential background in both the land use planning and human rights areas.⁴

⁴ The writer has an undergraduate degree in the field of urban and regional planning, and worked directly in that field for seven years. Since then, he has been an investigator and mediator for the Ontario Human Rights Commission.

Chapter 1 - Citizenship: What Does It Mean?

According to Oxford, a "citizen" is "a person who has full rights in a country or commonwealth by birth or by naturalization."⁵ However, this definition is simply too narrow to provide a full understanding of the concept of citizenship as it is understood and debated.

For the purposes of this thesis, the following conceptualization, from John Rawls, is most appropriate.

Beginning with the ancient world, the concept of the person has been understood, in both philosophy and law, as the concept of someone who can take part in, or who can play a role in, social life, and hence exercise and respect its various rights and duties. Thus, we say a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.⁶

Rawls' concentration is on the individual. He reflects on the notion of citizens as "free and equal persons" whose "basic rights and liberties" are specified.⁷ In essence, where there is a constitutionally-based assurance of individual basic rights and liberties for the person, then the terms "person" and "citizen" are interchangeable.

⁵ The Concise Oxford Dictionary, (Avon, Great Britain: Oxford University Press, 1989), p.144.

⁶ John Rawls, Political Liberalism (New York: Columbia University Press, 1993), p.18.

⁷ *Ibid.*, p.27.

There is a good deal of literature dealing with the struggles of ethnic or nationalist or religious groups either to obtain nationhood or to be free from persecution or second-class status within their own lands. In Canada, this is exemplified by the ongoing debate surrounding the Quebecois; in the United Kingdom, the Irish Republicans fight a similar battle; and, the results of ethnic strife in the former Yugoslavia express the passion that surrounds such conflicts. However, it must be noted that these struggles are for group recognition, or special or distinct status, based on a group identity.

In other contexts, the citizenship question is one that concerns some type of individual freedom that is not enjoyed by all. The recent dismantling of the apartheid system in South Africa is a modern day reminder that racial lines have been used to define citizen status, possibly granting great individual benefits to some while directly oppressing others. Perhaps the finest piece of passionate writing surrounding the freedom aspect of citizenship is the following passage taken from *Uncle Tom's Cabin*, where the fleeing slave is contemplating his goal:

Is there anything in it glorious and dear for a nation that is not also glorious and dear for a man? What is freedom to a nation, but freedom to the individuals in it? What is freedom to that young man ... the tint of African blood in his cheek.... To your fathers, freedom was the right of a nation to be a nation. To him, it is the right of a man to be a man, and not a brute; the right to call the wife of his bosom his wife, and to protect her from lawless violence; the right to protect and educate his child; the right to have a home of his own, a religion of his own, a character of his own, unsubject to the will of another.⁸

⁸ Harriet Beecher Stowe, *Uncle Tom's Cabin*, (New York, Books Inc., 1922) p. 326.

While certainly a passionate plea, the above illustrates a most basic element of citizenship: individual freedom. Also, the barrier being described is the person's skin colour. While no minor consideration in the context of slavery, apartheid or racial discrimination, the point is that if the colour issue is determined to be inconsequential to citizen status, then there are (theoretically) no other barriers to citizen status and the enjoyment of all entitlements derived therefrom. In effect, individual freedom is the norm, while the challenge in this situation is to eliminate the racial barriers that prevent individuals from enjoying that norm. However, for others, the discussion of citizenship is not such a straightforward "black and white" consideration.

For person's with disabilities, the idea of citizenship is one of participation.

As of the 1980's, disabled people all over the world have taken up the struggle for equality and participation on an equal footing with other citizens.... Disabled people have come to a realization that their societies were built without their input and participation. One of the results of this recognition was a gathering of disabled people in Singapore in 1981 to form Disabled Peoples' International (DPI). DPI's mandate is to be the voice of disabled people and it believes that disabled people should be integrated into society and participate with the same rights as everyone else.... DPI was formed to express the views of the 10 percent of the world's population who are disabled in one way or another. There were over 500 million disabled people worldwide in 1985. Disabled people have a physical, mental or sensory impairment, and their handicap is the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others due to physical or social barriers.⁹

⁹ Diane Driedger, The Last Civil Rights Movement, (New York: St. Martin's Press, 1989) pp. 1,2.

As will be discussed, having certain rights assured constitutionally, does not necessarily mean full citizen participation. This is a particular concern for persons with disabilities, for whom rights are assured in word, but the ability to participate in society is still very restricted. Some of this is a function of environmental barriers, while the remainder can be attributed to attitudinal barriers.

By the 1960's and 1970's, people with disabilities began to question society's definition of them as odd and abnormal or as so-called cripples. They rejected the tendency of sociologists, social workers and doctors to label them as deviants, clients, patients. They became aware that society's attitude towards them, the idea that disabled people should be shut away from nondisabled society, was a handicap. Disabled people reminded everyone that people were mortal and vulnerable to physical and mental disabilities. Furthermore, because disabled people had been warehoused in institutions and shut away in parental homes, they had no input into the design of society's streets, buildings, sidewalks and work places. Many disabled people could not participate fully in society because they could not even enter most buildings.... If mobility-impaired people could not enter buildings, they could not attend university, hold down a job, or find a place to live outside an institution. Without education and income, disabled people could not become independent and enter the mainstream of society.¹⁰

Citizenship is thus not merely being a free member in word, but includes the actualization of being a participating member. Indeed, the various current writings on theories of citizenship would indicate that the concept is interpreted differently, especially along political ideological lines. However, regardless of the ideology, there is a tendency toward seeing participation as crucial in order to realize citizen status. People such as Ronald Beiner and Will Kymlicka have articulated the

¹⁰ *Ibid.*, p.2.

difference between the republican view of citizenship and the modern liberal approach. According to Beiner,

Theorizing citizenship requires that one take up questions having to do with membership, national identity, civic allegiance, and all the commonalities of sentiment and obligation that prompt one to feel that one belongs to *this* political community rather than *that* political community.¹¹

Without going into great detail, suffice it to say that regardless of the view being espoused, participation is a cornerstone. For ancient Athenians, "active citizenship was the highest form of life, transcending the lower realms of family and economy. Politics was the realm of honour and freedom....¹² Thus, to Beiner, "the term "republican citizenship", conjuring up images of robust civic involvement and citizen commitment, necessarily implies a rebuke to liberalism, with its minimalist conception of the duties and responsibilities of citizenship (preferring to define citizenship in terms of rights and entitlements)".¹³ Having access to employment and housing, for example, are the types of liberal "entitlements" referenced. Provided a person has such entitlements, they are enjoying citizen status.

¹¹ Ronald Beiner, Theorizing Citizenship, (New York: SUNY Press, 1994), p.17.

¹² Will Kymlicka, Recent Work in Citizenship Theory, (Ottawa, Multiculturalism and Citizenship Canada, 1992), p.23.

¹³ Ronald Beiner, Theorizing Citizenship, (New York: SUNY Press, 1994), p.17.

The discussion of type or degree of participation is easier to comprehend when considering it in the context of a homogenous society. However, in the pluralist society, that discussion takes on a wider dimension. In what Iris Marion Young terms the "Politics of Difference", the idea is that society should be open to accommodating, affirming and institutionalizing cultural difference. However, according to Kymlicka, "This will result in what Iris Young calls "differentiated citizenship", in which historically excluded groups will have special rights and legal status appropriate to their legal identity."¹⁴

Adding to the complexity of the discourse is the economic framework within which citizenship issues are discussed. In commenting on the writing of James Fallows, Ronald Beiner notes that "the Western Liberal commitment to the primacy of universal markets over national borders necessarily undermines the claims of citizenship in the formulation of economic policy."¹⁵ Further to this,

... the modern welfare state was intended to embody a definite *civic* ideal, in the sense that it grew out of the conviction that the state would have to guarantee a modicum of material security in an insecure world if it were serious about giving a content to citizenship that a relentlessly market-based society would otherwise betray without limit. In this respect, the willingness of Western democracies to tolerate a much greater influx in the structures of

¹⁴ Will Kymlicka, Recent Work in Citizenship Theory, (Ottawa, Multiculturalism and Citizenship Canada, 1992), p.26.

¹⁵ Ronald Beiner, Theorizing Citizenship, (New York: SUNY Press, 1994), p.18, commenting on James Fallows, "What is Economy For?", The Atlantic Monthly, January, 1994, pp. 76-92.

economic life, entailing a greatly reduced security of employment, cannot help but be symptomatic of a profound crisis in the idea of citizenship.¹⁶

The questions arising from such discussion concern the degree of emphasis placed on the rights, privileges and entitlements of the individual versus those for some defined group. According to Beiner, the extremes in this debate are liberalism and nationalism.¹⁷ He seeks a middle ground:

... my concern with citizenship is centrally motivated by the feeling that there must be a third alternative beyond liberalism and nationalism.... Liberalism seeks to give the individual primacy over the group, even (if necessary) at the price of an alienation from any and every group identity. Nationalism seeks to give the group primacy over the individual, which, as we see with more and more stark evidence today - contains the seeds of real human evils. As one of the neo-fascist thugs in the film *My Beautiful Launderette* says, "You have to belong to something." Extrapolating from the film, this statement about the need for belonging can be interpreted in two possible ways: Either fascism is a uniquely evil expression of an otherwise benign human need for belonging; or there is a kind of latent fascism implicit in any impulse toward group belonging. I find myself unable to dismiss the element of truth expressed in the second interpretation. Again, given this choice between alienating liberalism and the latent evil in any fully consistent nationalism, my response is that there has to be another alternative.¹⁸

Virtually absent from these writings, especially those concerning the plights and struggles of specific groups, was any meaningful discussion concerning persons with

¹⁶ *Ibid.*, pp. 18,19.

¹⁷ For his criticism of liberalism, see Ronald Beiner, What's the Matter With Liberalism? (Berkeley, University of California Press, 1992).

¹⁸ Ronald Beiner, Theorizing Citizenship, (New York: SUNY Press, 1994), p.16.

disabilities. Feminists, nationalists, Aborigines and religious or racially-based groups are all readily definable group identities, whose "citizenship" issues are at a more mature level of political discourse. With such identity comes the application of citizenship theories, and how best to meet the needs of such special interests. There were very few references to persons with disabilities in the literature.

One notable exception to this is John Rawls, where for the purposes of abstract discussion on the question of political justice (i.e. "what is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life?"),¹⁹ he states,

I put aside for the time being these temporary or permanent disabilities or disorders so severe as to prevent people from being cooperating members of society in the usual sense. Thus, while we begin with an idea of the person implicit in the public political culture, we idealize and simplify this idea in various ways in order to focus first on the main question.²⁰

Rawls does recognize that persons with disabilities do not fit conveniently in any generic or abstract discussion. This does not mean that he abandons them due to their specific circumstances. On the contrary, and to his credit, Rawls invites the very kind of analysis that is represented by this thesis.

¹⁹ John Rawls, Political Liberalism, (New York: Columbia University Press, 1993), p.20.

²⁰ *Ibid.*, p.20.

With regard to the problems on which justice as fairness may fail, there are several possibilities. One is that the idea of political justice does not cover everything, nor should we expect it to. Or the problem may indeed be one of political justice but justice as fairness is not correct in this case, however well it may do for other cases. How deep a fault this is must wait until the case itself can be examined. Perhaps we simply lack the ingenuity to see how the extension may proceed.²¹

As will be shown in subsequent chapters, the traditional conflict resolution strategies employed (i.e. adversarial court or tribunal processes) to exact our concept(s) of justice are such that the ingenuity referenced by Rawls is thwarted by a tendency to focus on those traditional methods. Adjusting the approach to conflict resolution (e.g. utilizing a conflict avoidance rationale) can bring about the realization of the justice as fairness concept.

The lack of extensive literature on citizenship questions for persons with disabilities may be because such a "group" defies definition, or it may be that as a group, persons with disabilities are not considered to have reached the level of civic maturity warranting such theoretical discourse. Or it may be a combination of the two.

Persons with disabilities are not looking for group recognition: their rights are already articulated in constitutional assurances. They are trying to realize the form of inclusion envisioned by the constitutional assurances. Their struggle is still at the stage of being made able to participate at all, as opposed to determining the degree or

²¹ *Ibid.*, p.21.

form of participation. Or, as Diane Driedger has so aptly stated, disabled persons represent "the last civil rights movement".²²

In today's political world, identity politics is common: special status and recognition for groups identified by religious, nationalistic, gender or racial commonalities. This is the level of discourse contemplated by people like Marion Iris Young (i.e. politics of difference). Persons with disabilities do not fit this concept, nor do they present themselves as such. At the same time,

[d]isabled people are starting to write about themselves as a collective body of people and to propose solutions for the barriers to equality in their lives.... Finklestein and Enns, both disabled, write about society's attitudes towards disabled people and how these attitudes have interacted with the growing demand for change expressed by disabled persons. They view environmental and attitudinal barriers as the reason why disabled individuals are unable to participate, rather than their disabilities. Society, however, still views people with disabilities as sick, helpless patients who need to be cared for.²³

As is posited herein, this maternal/paternal view of persons with disabilities will continue to prevail until the physical barriers to participation in society are systemically removed. So long as a person with a disability needs to be carried into a

²² Diane Driedger, The Last Civil Rights Movement, (New York: St. Martin's Press, 1989).

²³ *Ibid.*, p.3.

building (especially to carry out some civic function), he/she will continue to be viewed as helpless.²⁴

Any discussion on the preference of the writer regarding republican, modern liberal or any other ideological view of citizen participation is beyond the scope of this study. However, it is helpful to provide an overview of the types of participation envisioned within these ideologies. First, there is political citizen participation. Everything from voting, being an active member of a political party, taking part in public demonstrations, holding political office or lobbying for legislative change fits this category. Social and economic citizen participation means being able to be employed, act in the volunteer sector, secure affordable housing, have access to education, act as a consumer of goods and services, or go to church/synagogue/temple.²⁵

Consistent with current trends in reduced public budgets, government cutbacks, and greater reliance on the volunteer sector to fill those voids, the demand for citizen

²⁴ The maternal/paternal approach is very well articulated by Diane Driedger in The Last Civil Rights Movement, particularly in Chapter 2 of that book, concerning historical development of the disabled people's movement.

²⁵ Will Kymlicka discusses the variety of interpretations on citizen participation in Recent Work in Citizenship Theory, (Ottawa, Multiculturalism and Citizenship Canada, 1992), Chapter 2. Included are the views of theorists such as Joseph Carens, William A. Gaston, Nathan Glazer, David Held, Desmond S. King, Stephen Macedo, Adrian Oldfield, Judith Shklar and Michael Walzer.

participation is on the rise. Taking responsibility for one's status as a citizen is part of that trend. Active citizen participation is required, even though it is theoretically acceptable to opt out of active participation in a free society. In this regard, assuming that not every person feels the urge to volunteer their efforts to community activities (or to help the less fortunate), it would be irresponsible to close that door to people who wish to participate but otherwise are physically incapable because of a lack of proper physical amenity. To be sure,

[i]n numbers that have never been so large, people are stepping forward to help their fellow citizens and to do good works in their communities. It is a study in contrasts - the politics of confrontation versus the practice of volunteerism, men in suits versus folks in shirts and skirts.... So long as people do not delude themselves that volunteers and the private sector will ever take up all the slack caused by government cutbacks, the growing sense of grassroots communities can be a useful reminder of fundamental verities - it is better to give than to receive, better to get a hand up than a handout.²⁶

For most persons with disabilities, the discourse of Beiner, Kymlicka, Iris Young and others is effectively moot. Societal and institutional barriers to citizen participation for persons with disabilities make such discussion premature at best. By maintaining physical barriers to citizen participation for persons with disabilities, such people will be seen as requiring the handout, while not even having the hand up extended to them nor allowing them to extend their own hands (to others) as active citizens.

²⁶ Robert Lewis, Maclean's, "Making a Difference" (Toronto, July 1, 1996) p.2.

In subsequent chapters, the task is to outline the method(s) by which the barriers to participation can be systemically overcome. Only then can the more "mature" discourse have meaning or application for persons with disabilities.

Chapter 2 - Administrative Justice

In Ontario, one of the institutionalized vehicles for citizen participation, and for making determinations on matters such as social welfare entitlements, is the administrative justice system. Administrative justice is an area where conflict is resolved, conflicts such as those arising from group versus individual struggles, and where the opportunity exists for participants to have their view heard and their issues accommodated, if deemed appropriate. For example, in the field of land use planning, where the public interest may be in environmental conservation and an individual interest is proposing land development activity, the administrative justice system can be used to consider all interests, and to devise a solution that reflects the various interests. That does not necessarily mean a compromise amongst competing interests, but it may where there is justification for doing so.

2.1 Types of Tribunals

The administrative justice system in Ontario is very extensive, and within it there are a wide variety of policies and programs. The Government of Ontario, in its Guide to Agencies, Boards and Commissions,²⁷ details the extent of that system. While a complete review of the variety of bodies outlined in that catalogue is beyond the scope

²⁷ Government of Ontario, Guide to Ontario Agencies, Boards and Commissions, (Toronto, 1994).

of this study, it is helpful to provide some examples of the types of issues dealt with and the approaches used. There will also be discussion as to the rationale behind (i.e. arguments supporting) the assignment of particular issues to an administrative agency. There will then be a focus on those agencies empowered to make rulings in the areas of land use planning and human rights, as these are of particular concern to this study. Finally, current trends impacting on the delivery of the administrative justice service will be identified.

Some administrative justice agencies are, by function, appellate bodies. Their responsibility is to review the decisions of an official. A good example of this type in Ontario is the Social Assistance Review Board (SARB). Ontario's current system of providing social assistance payments to people in need involves a considerable network of both provincial and municipal level officials. For example, General Welfare Assistance (under the General Welfare Assistance Act, R.S.O., 1990) is provided at the regional, county and district levels of municipal organization, while the Family Benefits Program (known colloquially as "Mother's Allowance") under the Family Benefits Act, R.S.O., 1990, is administered from the provincial level (i.e. Ministry of Community and Social Services). In both programs, determinations on assistance are made by staff persons, generally referred to as case workers. However, where the determination of the case worker is disputed (generally when such benefits are terminated or the initial application for benefits is denied), an appeal is made to SARB. In this regard, SARB functions as the appeal body from staff-level

decisions. The design of this system (i.e. delegated authority to the front line, with a higher level appeal body) may be the best method of dealing with the numerical and geographic extent of the social assistance system.

There are other administrative agencies whose functions are "watchdog" in nature, with respect to particular industries, professions or areas of commerce. Examples of these include the Ontario Securities Commission (concerning the regulatory framework guiding proper trading of stocks and bonds) and the Ontario Insurance Commission, which regulates such things as insurance rates and the conduct of insurance providers. A similar function is carried out by the Health Disciplines Board, as it reviews the performance and conduct of medical practitioners within the larger public health service regime (i.e. public hospitals).

Some boards have been set up to become specialized alternatives to the courts, thereby removing certain issues from the court system. Of note in this area is the Worker's Compensation Board, whose primary function is to deal with injured worker issues. This was one of the first subject areas to be handled by an administrative agency, on a large scale, in Ontario and elsewhere.²⁸

Historically, however, while workers' compensation issues are widely regarded to be among the first larger scale administrative justice concerns, the delegation of conflict

²⁸ Lecture by Professor Carl Baar in POL5P58, Brock University, (St. Catharines, Ontario), April 5, 1995.

resolution responsibilities outside of a court setting has been taking place in Ontario since the earliest days of municipal organization. Although not very well known today, the position of "fence viewer" was of considerable importance in early settlement times. The fence viewer, being an appointee, was the localized form of administrative justice official in the area of boundary disputes concerning property. The importance of this function in those early days cannot be understated. The determination of the fence viewer could have considerable impact on continued neighbour-to-neighbour relations. The fence viewer is still used in many (mostly rural) municipalities.

The Ontario Labour Relations Board (OLRB), along with its responsibility to adjudicate disputes in the area of collective bargaining, performs a certification function. The Ontario Labour Relations Act, R.S.O. 1990, authorizes the OLRB to certify prospective bargaining agents (e.g. trade unions) to act on behalf of their constituent members. The OLRB then (through the same Act) regulates the manner in which the collective bargaining process is carried out.

Human Rights and specialized equity issues are also adjudicated in the administrative justice system in Ontario. The Ontario Human Rights Commission is an agency concerned with issues of discrimination and harassment. Persons claiming to be aggrieved in this fashion can have their issues investigated and possibly mediated, and may even be given a hearing where the Human Rights Commission considers that the

issue represented by a particular complaint or series of complaints is such that the public interest in combatting discrimination would be served by adjudication. This is the process available to persons with disabilities where their claims of discrimination, including a claim of a lack of physical access, would be considered. However, it must be noted that the Human Rights Commission performs a "gatekeeper" function, in that before the tribunal (i.e. Board of Inquiry) can be assigned to adjudicate a human rights complaint, the Commission must first be satisfied that the matter is appropriate.²⁹ Effectively, there is a staged process which must be followed before consideration is given to full adjudication. In Chapter 5 this process is more fully explained and critiqued, especially as a vehicle for assuring access for persons with disabilities.

Administrative justice agencies can also be used by the province to exert control over the municipal level of government. Provincial authority over municipal affairs is spelled out in the Constitution Act 1867; however, the provinces do not involve themselves with the day-to-day operation of municipal government. Using legislative, policy and financial controls, the municipalities are kept in check. One of the best illustrations of this is the function (among others) of the Ontario Municipal Board (OMB), whereby municipal capital budgets must receive approval of the Board, prior

²⁹ See Human Rights Code, R.S.O. 1990, Chapter H.19, Section 36.

to the particular municipality's issuance of debentures on the open market.³⁰ The OMB considers the ability of the municipal entity to raise revenues to meet the requirements of the incurred debt, thereby assuring provincial control over municipal fiscal responsibility.

Another provincial control function of the OMB is land use planning. In this regard, municipalities are delegated responsibility for a wide variety of land use issues, from zoning to land separation to site planning. Appeals from such municipal-level decisions are made to the OMB. Using consistent land use criteria, including the application of known provincial standards and established case law, municipal entities are kept from exceeding their powers, from disrespecting or disregarding provincial requirements or from otherwise creating a potential for future conflict between land uses. It is this functioning of administrative agencies (i.e. exerting provincial control over municipal activities) that is particularly important in this study.

2.2 Justifications for the Administrative Justice System

As can be seen from the examples provided, administrative justice agencies specialize in particular areas. While there are arguments suggesting the courts are the only

³⁰ Patrick J. Robson, Regional Niagara Debenture Issuance Function, senior research work as required for undergraduate degree in Urban and Regional Planning, Ryerson Polytechnical Institute (Toronto, 1984), and, Ontario Municipal Board Act, R.S.O. 1990, Chapter O.28.

effective forum for determining issues of social justice,³¹ the expertise of those assigned to deal with specialized subject matter is an argument supporting the removal of such determinations (at least at first instance) from the courts.

The difficulty with the "expertise" suggestion is that it assumes that persons assigned authority are (in fact) experts. In the appointments system, there may be considerations beyond those of the expert qualifications of the potential appointees. An appointment may be a function of political patronage, or an appointment may be made where the appointee has demonstrated effective advocacy of a certain cause. Further, being expert in a particular policy area does not necessarily equate to an understanding of adjudicative functioning. In Ontario, these concerns, among others, are currently being addressed by the Society of Ontario Adjudicators and Regulators (SOAR),³² in order to assure the legitimacy of the expert nature of administrative agency functions.

Most administrative tribunal decisions are appealable to the courts, to consider alleged errors in fact or law. However, by hiving off certain activities from the courts (at least in first instance), the courts can keep up with other matters before them,

³¹ Owen M. Fiss, "Against Settlement", 93 Yale Law Journal 1073 (1984).

³² See Margot Priest, *Fundamental Reforms to the Ontario Administrative Justice System*, Draft document prepared for the Access to Civil Justice Project, (Ottawa, 1995), and, Society of Ontario Adjudicators and Regulators, *First Principles of Administrative Justice* (Toronto, 1995).

including criminal matters and civil actions such as divorce, estate and contract disputes. And, since the expertise is theoretically already in the administrative justice agency, the errors in fact (at least) should be minimal. Therefore, if a matter is subsequently appealed to the courts, court time will be minimized due to a greater focus on the alleged error(s) made by the administrative justice agency in question. This should have the effect of assisting in case management within the courts.

However, there may be (and have been) parallel case management problems for the individual administrative justice agencies. In 1990, the backlog at the Ontario Human Rights Commission (OHRC) warranted the hiring of a separate "task force" to assist in clearing that backlog. While the task force approach provided some short term success,³³ it is not a long term solution. This issue will be discussed in greater detail further on in this study.

Assured procedural rights in administrative tribunals is another argument in favour of shifting some adjudication from the courts to administrative tribunals. The Statutory Powers and Procedures Act, R.S.O. 1990, being the legislation governing the functioning of most administrative tribunals in Ontario, provides guarantees in the area of natural justice, such as reasonable disclosure, right to a hearing and reasonable adjournments. By providing the same procedural rights to participants gives legitimacy to the tribunal system as an alternative to the courts.

³³ Ontario Human Rights Commission, Annual Report, 1992/93 (Toronto, 1995).

There are, however, inherent structural problems in the administrative justice system in Ontario. Although groups such as SOAR correctly view the administrative justice system as a "system", the operational and reporting considerations surrounding administrative justice agencies create considerable confusion, inefficiency and duplication. To illustrate, the courts are all administered under the authority of the Ministry of the Attorney General, thereby assuring (to the greatest extent possible) a consistent application of policies and practices. Administrative justice agencies, by contrast, report to any number of ministries, or may be responsible for adjudicating in areas where multiple ministerial mandates are grouped together. As will be discussed, these concerns may actually be catalysts for effective change.

2.3 Trends Affecting Administrative Justice in Ontario

Fiscal restraint. "Doing more with less". Reducing the size of government while assuring the same level of service. Re-engineering, re-tooling, downsizing, right-sizing, restructuring and de-mystifying. These are all indicators of the same trend, from which administrative justice agencies are not immune. In fact,

In May, 1993, the Ontario Cabinet authorized a project to improve the effectiveness and efficiency of service to the public of Ontario's quasi-judicial agencies. The two specific objectives were (1) to maintain or improve the capacity for responsiveness and timely service; and (2) to contain, reduce or recover the cost of service. The program was initiated in an atmosphere of deficit reduction and government restructuring to reduce costs.³⁴

³⁴ Margot Priest, *Fundamental Reforms to the Ontario Administrative Justice System*, Draft Document, (Ottawa, 1995) p.35.

It is noteworthy that, in May 1993, the New Democratic Party formed the government. Since then, the Progressive Conservative government has taken power on a platform of much greater fiscal restraint. Given the extent of the cuts to ministry budgets and staff that have been pursued by the current government, the 1993 review becomes that much more important in terms of providing tangible results.

New technology is another issue affecting the administrative justice system. Whether from the prospective of caseflow management, making the services more readily available to remote areas, eliminating the bureaucracy associated with document filing and scheduling hearings, or merely as a means to access information more quickly, the application of new technology means that the old ways of doing business are changing.

Reduction in funding to legal aid programs is another current trend affecting the functioning (and effectiveness) of administrative justice agencies. It is widely accepted by advocates for the poor or disenfranchised individuals that cuts to legal aid systems result in the greatest impact on those least able to bear the brunt of such cuts.³⁵ In reference to the affects of legal aid cuts on women,

The success of any justice system will be measured in part by the ability of its constituents to access the justice system.... Any reform to legal aid must not

³⁵ Government of Canada, Legal Aid and the Poor, (Ottawa, Minister of Supply and Services, Winter 1995).

further erode women's access to legal services. The equitable administration of justice - not to mention women's equality entitlements under the Charter - demands it.³⁶

The same analogy holds true for persons with disabilities. However, accepting that cuts to legal aid are unavoidable in the current fiscal climate, and that such cuts form part of a larger public agenda, attention must then be drawn to the method of delivery of justice services. It may be that the current processes can be restructured such that cuts to legal aid can be absorbed while still assuring the justice being sought (especially as assured in legislation).

Cooperative efforts, co-location and streamlining of activities between agencies are all proposals under consideration. To illustrate,

The [1993] Project worked with equity rights tribunals to consolidate their administrations.... The Assessment Review Board is planning to co-locate with the Ontario Municipal Board, which hears appeals from the ARB's decisions. The co-location will permit the sharing of resources and the reorganization of the ARB.

The Project is examining the feasibility of the administrative consolidation of other agencies, including the Liquor Licence Board, the Racing Commission and the Gaming Commission. These agencies report through the Minister of Consumer and Commercial Relations. There have also been proposals to merge these agencies into one "Sin Commission."

Other "families" of agencies are also being examined for feasibility of administrative consolidation or actual merger. These include labour agencies,

³⁶ Lisa Addario, *Women Shouldn't Bear the Brunt of Legal Aid Crisis*, Toronto Star, (September 2, 1995).

and agencies concerned with the use of land (Ontario Municipal Board, Environmental Assessment Board and the Environmental Appeal Board)...³⁷

While such efforts are laudable, in the current fiscal climate, the grouping of agencies by subject area (e.g. equity, land use, "sin" activities) presupposes that, for example, there is nothing to be shared or restructured (or there is not already duplication of efforts) between agencies dealing with land use and those concerned with equity issues. This is of particular importance for this study, as will be discussed below.

What is important here is that since overlaps exist and are currently under consideration for the purposes of increasing efficiency, practitioners (e.g. in SOAR) recognize that a review of current functions is required. However, the most recent review and the resultant recommendations have been restricted to similarly-mandated or common issue bodies.

A more generic justice issue, which is very applicable to the administrative justice field, is that concerning delays in adjudication. In R. v. Askov,³⁸ the Supreme Court of Canada made it clear that administrative delay was not to be tolerated in the context of assured rights of trial within a reasonable time.³⁹ While Askov dealt with

³⁷ Margot Priest, *Fundamental Reforms to the Ontario Administrative Justice System*, Draft Document, (Ottawa, 1995) p. 37.

³⁸ R. v. Askov, 74 DLR [4th] 335-403.

³⁹ Pursuant to Section 11(b) of the Canadian Charter of Rights and Freedoms.

criminal law, the principle of a hearing within a reasonable time has also been applied recently in administrative tribunals. Of particular relevance, for the purposes of this study, is the case of Shreve v. The City of Windsor.⁴⁰ In that case, the Respondent (i.e. City of Windsor) requested, among other things, that the matter be dismissed due to the length of time that had been taken to bring the matter to a hearing. The Board did not accept the delay contention in that particular instance, but warned that administrative delay could be a factor in future cases.

Consistent with the case law, in terms of addressing delay in human rights matters in Ontario, the Human Rights Code provides the following:

34(1)(d) Where it appears to the Commission that the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may, in its discretion, decide not to deal with the complaint.⁴¹

In this regard, there is a narrow window of time for asserting one's human rights claims, where such rights are seen to be offended. The discretionary statute of limitations is for the Commission to determine, and not the Board of Inquiry.⁴²

⁴⁰ Alan Shreve v. The City of Windsor, et al, (2) (1993) 18 C.H.R.R., D/363 (Ont. Board of Inquiry).

⁴¹ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 34(1)(d).

⁴² See Elliot v. Epp Shopping Centres, (1993), 21 C.H.R.R. D/333, where the Board of Inquiry dismisses the motion concerning delay, claiming that the discretion in terms of delay in filing a complaint rests with the Commission, not the Board.

Theoretically, if the time frame was missed, the right may never be assured. Further, the person claiming to be aggrieved by the lack of an assured right is now faced with possibly having to argue other legal concepts (i.e. good faith/bad faith, substantial prejudice) that will be foreign to them if they lack legal training (as most people do).

Alternative Dispute Resolution (ADR) is another trend impacting on the administrative justice system. However, the experience thus far would appear to be restricted to mediation as an alternative to an adjudicated decision.⁴³ Chapter 3 of this study is devoted to the issue of ADR.

2.4 Land Use and Equity Issues in Administrative Justice (Ontario)

As previously noted, land use matters in Ontario are adjudicated in a variety of venues. These include the Ontario Municipal Board (OMB), the Environmental Assessment Board (EAB), the Environmental Appeals Board and Niagara Escarpment Development Control (in the geographic jurisdiction of the Niagara Escarpment Commission). While not an adjudicator, the Minister of Municipal Affairs has the final say in the case of development proposals in the Parkway Belt West Planning Area. The OMB deals with the widest variety of land use planning matters, from municipal official plans and comprehensive zoning by-laws to site-specific issues,

⁴³ Margot Priest, *Fundamental Reforms to the Ontario Administrative Justice System*, Draft Document, (Ottawa, 1995) pp. 27, 28.

land severance appeals, subdivision agreements, and assessing compliance with a variety of provincial policy statements (e.g. Foodland Guidelines, Mineral Resource Extraction).⁴⁴ By contrast, the Niagara Escarpment Development Control office hears appeals of the decisions of the Niagara Escarpment Commission (NEC) concerning development activity in that agency's defined geographic area of jurisdiction. Despite the two tribunals having defined jurisdictional areas, there is a great deal of overlap. For example, where a proposal involves a severance under the Planning Act (issued by a municipal land division committee or committee of adjustment) and a proposed development in the NEC's jurisdiction, the resolution of the matter may require two separate tribunals, the results of which could be diametrically opposed. This is highly inefficient and confusing for everyone, especially the public.

One inventive way around such problems is manifested in the Consolidated Hearings Act, which allows for the combining of appeals into one body.⁴⁵ This Act is restricted to land use questions, but does help to reconcile competing and possible divergent public policy interests.

⁴⁴ These powers are expressed in various pieces of legislation, including the Ontario Municipal Board Act, R.S.O. 1990, Chapter O.28, and the Planning Act 1992, R.S.O. 1992, Chapter P.13.

⁴⁵ Consolidated Hearings Act, R.S.O. 1990, Chapter C.29, Section 8.

Equity issues, by contrast, are almost entirely within the jurisdiction of the Ontario Human Rights Commission under the Human Rights Code.⁴⁶ While there had been separate entities to consider employment equity and pay equity, the current government has moved to eliminate these fledgling agencies, bringing the issues back to the Human Rights Commission, and through them to the Board of Inquiry office.⁴⁷ The Code is intended to provide protection from discrimination and harassment on 15 enumerated grounds (e.g. race, ethnic origin, gender, creed) in a variety of social areas (e.g. employment, rental housing, contracts, goods/services/facilities and membership in a trade union/vocational association).

Within the Human Rights Code, there exists a mechanism for the identification of more appropriate processes or Acts to consider matters normally finding formal protection in the Code. According to Section 34 (1)(a) of the Code,

Where it appears to the Commission that the complaint is one that could or should be more appropriately dealt with under an Act other than this Act, the Commission may, in its discretion, decide not to deal with the complaint.⁴⁸

While some may see this as a case management tool (i.e. clearing cases from caseload), it is actually consistent with the educational intent of the Code, in that the

⁴⁶ Human Rights Code, R.S.O. 1990, Chapter H.19.

⁴⁷ see An Act to Repeal the Employment Equity Act, S.O. 1995, and "Pay Equity's Future at Risk, Group Says", Globe & Mail, April 11, 1996.

⁴⁸ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 34 (1) (a).

protections provided by this quasi-constitutional legislation should pervade society. Allowing the protections to be assured in "more appropriate" ways (i.e. outside the process prescribed in the Code), demands that these other ways and means be investigated and considered.

Whether adjudicated in the area of human rights, land use, social welfare or labour relations, the determinations of administrative justice agencies can directly impact on the definition and understanding of citizenship. The right to be free from discrimination is a citizenship issue. Social welfare entitlements, and the distribution thereof, assist in defining society's commitment to its citizens (i.e. in the liberal view). Minimizing conflicts in the area of land use helps to define the interactions of citizens. Being able to bargain collectively for conditions of employment is a citizenship issue, arguably both the republican view because of the politicized nature of the labour "movement" and the liberal view in the context of social and economic entitlements. Therefore, if a certain citizenship assurance is not currently being realized through existing mechanisms, then the administrative justice system should be reviewed to determine if that system is capable of changing to meet that challenge.

Chapter 3 - Alternative Dispute Resolution

The term "Alternative Dispute Resolution" (ADR), is one which is very topical in today's society. Depending on the context, ADR can carry a variety of interpretations, applications and opinions on relative effectiveness. The purpose of this chapter is to identify the various forms of ADR, including applications in the United States, Canada, and notably Ontario, and to present and evaluate the arguments for and against its use.

The discussion will then focus on two seemingly distinct conflict areas, namely land use planning and physical access for persons with disabilities. Canadian (i.e. federal and provincial other than Ontario), Ontario and U.S. references will be used to identify how ADR is (or isn't) applied in each context. This is intended to provide the necessary background to more detailed assessment of how one conflict area (physical access for persons with disabilities) may benefit from the application of dispute avoidance principles, principles inherent in land use planning.

ADR is applied in many forums, from the more commonly recognized court processes, including civil, criminal and family law, to variations of the ADR concept in other important areas such as international disputes, disputes in cultural and religious areas, and even to personal and corporate finance issues. With such a variety of applications, it follows that there is also a diversity of interpretations as to

what ADR really means (or could mean), on the scope of its application, and on the appropriateness of employing ADR techniques.

Before examining ADR in depth, it is necessary to define the term "alternative".

According to Oxford Dictionary, the following definition is provided,

adj. available in place of something else.; **n.** one of two or more possibilities.... A few people prefer not to use this word of more than two possibilities because it is derived from the Latin **alter** (= one or the other of two), but the use is well established in standard English.⁴⁹

This definition, particularly the identification of the adjective/noun and Latin/English distinctions, provides a sound framework for the analysis presented in this study. As the definition so succinctly points out, some think that the scope of "alternatives" can be as limited as an "either/or" consideration, or as broad as the imagination will allow. It is therefore necessary to discuss some areas where ADR is being applied, as well as the scope of these applications.

3.1 ADR - Applications and Interpretations

According to the literature on the subject, the greatest attention to ADR is in court processes. There is also literature regarding ADR in labour relations, international relations and in culturally specific areas. Other writings concern more generic assessments of ADR (e.g. arbitration vs. mediation). The writings concentrate on

⁴⁹ The Oxford Large Print Dictionary, (Toronto: Oxford University Press, 1991), p.22.

the appropriateness of avoiding judicial determination, with the key considerations being the impact on the ideal of "justice",⁵⁰ and the administrative efficiency associated with judicial determinations on matters which may be resolved by alternative methods.⁵¹ However, there are many writings that espouse much greater breadth of ADR applications, and these will be assessed in due course.

In courts and administrative tribunals, the term "alternative" is generally applied in a narrow context. The alternative is to a judicial or quasi-judicial determination of an issue under dispute. While more readily identifiable in civil law matters, where the options include third party intervention (i.e. binding arbitration or mediation), there are many other legal matters which use ADR, areas as diverse as natural environment protection, equity and labour laws, and criminal law where issues such as cultural sensitivity are evident. However, in many fields, ADR is not necessarily used to provide an alternative to a judicial determination, but rather to provide a venue other than the courts for the determination to be made, at least at the early stages of a dispute. To elaborate, most administrative tribunals in Ontario can have their decisions appealed into the court system, but such appeals are based solely on considerations of alleged error(s) in fact or law, as applied by the tribunal. In this regard, while the tribunal operates at a remove from the courts, the adjudicative

⁵⁰ For example, see Owen Fiss, *"Against Settlement"*, 93 Yale Law Journal, 1073 (1984).

⁵¹ See for example, Geoffrey Hazard Jr. and Paul D. Scott, *"The Private Nature of Public Adjudication"*, Yale Law & Policy Review, Vol. 6:42, 1988.

function of the tribunal is effectively an authority delegated from the courts by the legislature. The alternative is therefore a matter of delegating adjudicative responsibility in the first instance, with the tribunal still being accountable to the courts.

The main reasons cited in support of alternative dispute mechanisms in the court context are:

First... litigation costs money and time, which prohibits access for some litigants and certain types of disputes.... The second concern is court congestion and delay.... Third, formal litigation's adversarial winner-take-all process and remedies may be inappropriate for certain disputes.... Fourth, competence and resources of opposing lawyers are rarely equal.⁵²

In terms of the fourth reason cited, it can only be assumed that the reference is to the fact that, for some litigants, the time and money required for protracted litigation make traditional forms of conflict resolution prohibitive. However, if resolution can be effected at early stages of litigation, then fewer economically marginalized people will be deterred from engaging in litigation. But this does not mean that the incorporation of ADR into traditional court actions will somehow negate the disparity in the competence and resources of opposing lawyers.

⁵² Judith M. Keegan, *"The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation"*, Missouri Journal of Dispute Resolution, (Vol. 1987) pp. 13,14.

3.2 Arbitration

Arbitration is identified by the literature as one form of ADR. Returning to Oxford's Dictionary, arbitration is the "settlement of a dispute by a person or persons acting as an arbitrator."⁵³ Implied in this definition is that someone (e.g. a judge) makes a determination on the merits of the arguments presented in the dispute. Indeed, this is the practice. While some dispute contexts, such as collective bargaining, utilize arbitration extensively, the only "alternative" relationship here is that the venue has changed from the courts to a more specific "quasi-judicial" focus. One argument in support of arbitration is that due to the pluralistic nature of our dispute contexts, some areas require a greater level of expertise by the empowered decision-maker. One clear example of this is in the area of environmental law.

Another reason forwarded in support of arbitration is that the courts are concerned with matters more appropriately before them (e.g. criminal cases), so alternative venues provide for proper attention and consideration of the issues at hand. This is the premise behind many of the administrative tribunals present in Canada and elsewhere, where these quasi-judicial bodies are specialized in terms of area of expertise or function or both.

⁵³ The Oxford Large Print Dictionary, (Toronto: Oxford University Press, 1991) p.36.

Arbitration is often prescribed as a last resort in many instances, to be used only after more consensual methods (e.g. collective bargaining, mediation) have failed.

However, arbitration is still an adversarial process, where it is recognized that the disputants could not agree on appropriate outcome/remedy (assuming they were given the opportunity to explore a mutually agreeable resolution to their dispute).

For example, in the labour relations context (in Ontario), legislation prescribes an elaborate process for establishing the right to bargain collectively, the methods by which disputed issues can be negotiated and mediated, and rules against "unfair practices." Where this legislated process fails to provide a resolution that is satisfactory to all parties, the parties can defer to an arbitrator. The determination of the arbitrator can sometimes be binding, depending on the agreement of the parties.⁵⁴ It is interesting to note that where arbitration is not pursued, the alternative is direct conflict (e.g. strike, lockout). In short, arbitration is an alternative only in terms of venue offered. The alternative (and precursor) to arbitration is mediation.

3.3 Mediation

The major distinction between mediation and other forms of dispute resolution is that the mediator is not the decision maker.

⁵⁴ Labour Relations Act, 1995, S.O. 1995, Chapter 1, Schedule A.

Mediation has been defined as a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what that resolution should be. Mediation is also described as a facilitated negotiation. Mediation is an informal, non-adversarial process to help disputing parties reach a mutually acceptable agreement.⁵⁵

In this regard, the alternative is having a judicial decision made. To be sure,

... the role of the mediator is not to judge the merits of the dispute, but rather to act as a facilitator, by improving communication, clarifying issues and the interests of the parties, helping the parties to generate options to resolve the dispute.... [T]he focus is not on fault or liability, but on solving problems and finding solutions....⁵⁶

Mediation processes have been incorporated into larger contexts, such as civil case management. This has been done by making mediation a legislative requirement or by court rule. Many jurisdictions have moved in this direction, with the literature (predominantly U.S.-based) reflecting some rather involved mechanisms for ADR, particularly mediation.⁵⁷ In Ontario, there are various applications, including an ADR Centre in Toronto, where litigants willingly submit to a mediation process operated by the courts. Also, the use of the pre-trial conference to resolve (or

⁵⁵ Margot F. Evans, *"Mandatory Mediation in the Superior Court System"*, (Charlotte, N.C., May 1994), p.1.

⁵⁶ *Ibid.*, p.1.

⁵⁷ See for example, 1993 Annual Report on Dispute Resolution Centres, (Olympia, Wash.: Office of the Administrator for the Courts, March 1994), or, the Missouri Journal of Dispute Resolution, (many Vols.).

narrow) the issues in a dispute is a method used to avoid or at least minimize the extent of a judicial determination (i.e. to those items remaining in dispute).⁵⁸

In Ontario, mediation is being used in varying degrees. An example of this in anti-discrimination law is when the Human Rights Code, prescribes that the Ontario Human Rights Commission "endeavour to effect a settlement"⁵⁹ prior to a determination being made as to guilt and/or liability. This reflects the underlying premise in that law that it is compliance-based, and not punitive in nature. However, recent changes to this law has reduced the mandatory requirement to a discretionary item.⁶⁰ The concern arising from this change is that adversarial and confrontational methods of redressing human rights issues may increase in use.

Further, recent developments in the area of civil law case management (in response to significant case backlog) indicate that mediation or other ADR mechanisms may soon be incorporated by the courts into civil case handling procedures. Currently,

... the Ontario Task Force is counting on what it perceives as a widespread loss of faith in the system to give the package political impetus.... It wants to see the courts offer alternative ways of resolving disputes - mediation, for

⁵⁸ As per a discussion with D. Pinnington, member of the Ontario Bar, counsel with Lancaster, Mix & Welch, St. Catharines, Ontario, January 15, 1996.

⁵⁹ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 33 (1) (a).

⁶⁰ Human Rights Code, R.S.O. 1990, Chapter H.19, as amended by 1994, Chapter 27, s.65.

example - but says that just how this will work must await the evaluation of a pilot dispute-resolution project now running in Toronto.⁶¹

3.4 Negotiation

The literature on ADR also refers to negotiation or "assisted" negotiation as a form of ADR. Again, labour relations in Ontario is a prime example of where this is applied. First, the Labour Relations Act prescribes that "collective bargaining", a negotiation process, can take place, and then also allows for the use of further mediation or arbitration processes should negotiations fail. Unfortunately, there is little in the literature to differentiate negotiation from mediation, especially when terms such as "assisted" negotiation are used. The main difference would appear to be that negotiation is between the parties directly (including the use of bargaining agents), whereas mediation involves the use of a disinterested third party (as does arbitration). "Assisted" negotiation would appear to be mediation, perhaps at an earlier or less formal stage. In practice, the field of international relations presents a good example of assisted negotiation. Intervening in a dispute, either to avoid or stop violent conflict, the negotiator assists the sides in finding a common ground, even if only temporarily so that longer term solutions can be found.

What is clear is that ADR offers a variety of dispute resolution processes, including arbitration, mediation and assisted negotiation. Because of ADR's flexibility there are

⁶¹ Sean Fine, *"Squads of Judges Urged for Backlog"*, Globe & Mail, (Toronto, March 10, 1995).

numerous other methods which combine elements of and blur the distinctions between these three.⁶² One example of overlap is what is known as "Medarb". Essentially, this process involves a mediation phase, and if that is not successful in resolving all (or some) issues in dispute, the outstanding issues are determined by an arbitrator.

3.5 The Administrative Tribunal as an ADR Mechanism

As discussed in Chapter 2, in Ontario there are a wide variety of administrative tribunals. These bodies vary greatly in terms of composition, authority and jurisdictional area. The use of administrative tribunals qualifies as an "alternative" in the ADR context in respect to providing a specialized alternative venue to the courts. While these special purpose authorities vary in many respects, they also have many common characteristics. Their decisions, in many cases, carry the authority of law, and are appealable through court procedures.⁶³ They also have to follow rules of procedural fairness, although many of these tribunals are less rigid in terms of procedural formality. Perhaps the most problematic common characteristic for many tribunals (particularly the larger and more empowered ones) is that they also

⁶² Laird J. Rasmussen, Perspectives: A Periodic Review of Current Canadian Law, Vol. 10, No. 2, (Toronto, Fall 1994) p.1.

⁶³ Pursuant to the Statutory Powers and Procedures Act, R.S.O. 1990, appeals are to Divisional Court, a special arrangement involving a panel of three Ontario Court of Justice General Division members.

experience the types of problems associated with courts, such as case backlog and related delays.⁶⁴

This is particularly acute in a process such as that prescribed in the Human Rights Code, where complaints should commence within six months of the alleged discriminatory or harassing act(s).⁶⁵ If a complaint is not initiated within the time frame set out, the Human Rights Commission may decide not to deal with the matter, leaving the complainant without redress (apart from asking the same Commission to reconsider its decision).⁶⁶ This means that, where budgets are shrinking and there is increased competition for tighter resources, there is a need to consider (alternative) ways of assuring the rights prescribed by legislation.

The literature also distinguishes the public nature of adjudication from the private interests of participants, including lawyers. "Where disputes over claims of right ripen into legal disputes and resort is made to lawyers, the lawyers have an interest in their system that usually dominates the immediate interests of their clients."⁶⁷ Also,

⁶⁴ See Government of Ontario, Guide to Agencies Boards and Commissions, Toronto, 1994. Agencies such as the Ontario Labour Relations Board, Human Rights Commission and Ontario Municipal Board all exhibit case backlog problems.

⁶⁵ Human Rights Code, R.S.O., 1990, Chapter H.19, Section 34 (1) (d).

⁶⁶ *Ibid.*, Section 37.

⁶⁷ Geoffrey Hazard Jr. and Paul D. Scott, "The Public Nature of Private Adjudication", Yale Law & Policy Review, Vol. 6:42, (1988), p.60.

Ordering by public justice produces decisions resting on considerations that transcend the immediate dispute and the immediate parties. Ordering by private disposition can involve a normative frame of reference that includes only the immediate parties.⁶⁸

This distinction is being made out as a disadvantage to ADR.⁶⁹ While this distinction may be true in many respects (i.e. especially in commercial law applications), the legislated use of mediation, as an example, means that ADR pervades both the public and private arenas. However, if the litigants are willing to submit to a private process, with their own resources, then such an "alternative" must be respected. It may be that, especially in areas such as copyright law and commercial licensing, resolution cannot await a court determination (due to backlogs), whereby a private ADR process is the most effective and timely alternative.

3.6 ADR - Arguments For and Against

Before assessing other interpretations of what ADR means (or could mean), it is appropriate to provide some insights (gleaned from the literature) into the appropriateness of using alternatives to judicial determination. Perhaps the most cited opponent of ADR is Owen Fiss. Fiss cites problems arising from settlement as those

⁶⁸ *Ibid.*, p.59.

⁶⁹ Laird J. Rasmussen, Perspectives: A Periodic Review of Current Canadian Law, Vol. 10, No. 2, p.1.

associated with power struggles, coercion and the inability of the state to effect a larger goal of "justice", concluding that ADR should be "treated as a highly problematic technique for streamlining dockets".⁷⁰ His arguments stand in contrast with others, most notably those of former U.S. Chief Justice Warren Burger:

Because of his authoritative position as Chief Justice, Warren Burger set the tone for the language that characterized the speeches and writings of many others. He warned that adversarial modes of conflict resolution were tearing society apart. He claimed that Americans are inherently litigious, that alternative fora were more civilized.⁷¹

To further counter Fiss, Judith Keegan (and Marc Galanter) have pointed out that (in relation to civil tort litigation in the U.S.), "about 88% of the cases were settled and only 9% went to trial. It is much healthier to acknowledge that most cases are never going to be litigated, and then develop workable alternatives for resolution."⁷² Of that 9%, it may be that many of those settled before the trials ended. Also, the presence of backlog in many alternative dispute forums would merely indicate the

⁷⁰ Owen Fiss, "Against Settlement", 93 Yale Law Journal, (1983), pp.330-337.

⁷¹ Laura Nader, "The ADR Explosion - The Implications of Rhetoric in Legal Reform", Vol. 8 The Windsor Yearbook of Access to Justice, University of Windsor (1988), p.276.

⁷² Judith M. Keegan, "The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation", Missouri Journal of Dispute Resolution, (1987) p.23, and Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society", Vol. 31, U.C.L.A. Law Review, 4, 15 (1983).

moving of case management problems to those forums (prompting the need to develop effective case management tools within or across venues).

Fiss indicates that the social justice function of the court system is a primary reason for keeping issues in the courts. Resolving disputes through private adjudication, or having issues resolved before an opportunity is provided to establish precedents or refine existing precedents, means that public interest concerns may not be brought out through adjudicating some social issues. In this regard, decisions will not reflect true public interests.

Laird Rasmussen has characterized the advantages of ADR as follows:

- 1... ADR offers a variety of dispute resolution processes...;
- 2... To the extent that they are willing to do so, the parties to a dispute can determine the method and establish the rules by which it will be resolved...;
3. In the normal litigation process, once an action is commenced it can take anywhere from eighteen months to four years before the matter comes to trial.... Under ADR..., parties may be able to resolve their dispute within a matter of weeks;
4. ADR usually involves greater initial costs as the parties will pay the costs of a third party "dispute resolver". However, this cost may be offset by the time savings and associated savings in long-term financial and emotional costs;
- 5... Use of ADR to resolve a particular dispute in a non-adversarial fashion may well produce two results: one being the resolution of the dispute, and the second being the preservation of the relationship between the parties.⁷³

⁷³ Laird J. Rasmussen, Perspectives: A Periodic Review of Current Canadian Law, Vol. 10, No. 2, (Toronto, Fall 1994) p.3.

The preceding assessment has been provided not as a means of showing preference for one system over another, rather as a means of outlining the common definitions of and the issues surrounding ADR. However, ADR is present in other areas, and is actually expanding.

One of the terms associated with ADR is "harmony", and how to use ADR to restore or affect harmony. This is nothing new. In her article "Circle of Justice", Mary Nemeth recounts an example of the application of Aboriginal custom (i.e. restoring harmony) in the criminal law context. By involving the community in the decision as to what to do with an offender (especially a young offender), there is a greater likelihood not only that harmony will be restored, but that future offences will be curtailed. The article includes references to reduced recidivism rates in the Yukon Territory in situations where the community "harmony" approach is used.⁷⁴ While this example concerns criminal law, the "community" approach is applied to all facets of dispute resolution, including family matters. While the harmony may be viewed as conformity with the majority view, the non-conformity (or non-harmony) had the result of creating conflict (e.g. threats to safety, communal welfare).

The Aboriginal communities are not the only ones using the "harmony" approach. Immigrant communities, bringing their traditions with them, have imported ADR. Further, many of these dispute resolution traditions are religious based. Puritans,

⁷⁴ Mary Nemeth, "Circle of Justice", Maclean's, September 19, 1994, p.53.

Quakers and Jews are all among immigrant peoples who imported their community based resolution processes and techniques.⁷⁵

Finally, ADR has long been applied in criminal law in the form of plea bargaining.⁷⁶ This application, however, is another either/or situation. To illustrate, the defendant can choose trial (and possible conviction) or an assurance for a lesser charge and/or sentence, in exchange for a guilty plea, or providing critical evidence for convictions against others, or both. In this regard, there is no alternative to conviction, only to which charge the conviction will apply, and/or the sentence given.

3.7 ADR as an Alternative to a Dispute

ADR has been expressed in other terms as well. One could (and some do) interpret ADR as meaning, apart from the preceding contexts, that there is an alternative available to the dispute itself, or "dispute avoidance". Fiss' argument is that dispute is good, as is its formal determination, in that this will help to define societal issues. However, this misses that it is possible through proactive means to avoid (or at least considerably minimize) the need for resolving a dispute. In essence, by utilizing

⁷⁵ Judith M. Keegan, *"The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation"*, Missouri Journal of Dispute Resolution, (1987), p.15.

⁷⁶ Lecture of Professor Carl Baar in POL5P58, Brock University, (St. Catharines, Ontario, February, 1995).

preventive measures, there will be a great reduction in the incidence of eventual conflict.⁷⁷ This may be done, in many instances, by evolutionary means. To explain,

When there is general acceptance of legal standards of behavior in various kinds of social interaction, litigation is an unnecessary mechanism of social adjustment... [L]itigation over land titles and property boundary disputes has not subsided in the present era because there is less land development than there used to be, or less potential for disagreement over land use rights... [W]ith the exponential expansion ... of real estate development over the last century, the economic potential in real property litigation has also increased exponentially.... The absence of ... land title litigation is explained, rather, by a rechanneling of patterns of behavior that largely preempts land title litigation... We have engineered real estate transactions - technically, legally, financially - to exclude litigation as far as is practicable.⁷⁷

The above example shows that while litigation may still be required, it is the last resort after all avoidance mechanisms have failed. The same principles could be applied to many other areas of potential litigation, areas as diverse as divorce and debt litigation. We see today many alternatives to debt litigation. One can "restructure" or "consolidate" financial liabilities, thereby avoiding debtor's court (which in turn allows the courts to concentrate on more pressing issues).

In divorce matters, there can often be considerable expense to parties, to the state for court time and for potential public assistance requirements resulting from (or as an adjunct to) the litigation. Legal assistance for participating in the litigation, counselling for adults and children (resulting from residual strains caused by family break-up), and perhaps public financial assistance to cover basic needs upon

⁷⁷ Geoffrey C. Hazard Jr., *"Authority in the Dock"* Vol. 69 Boston University Law Review, (1989) pp. 472,473.

dissolution of the union, all contribute to a need to consider alternatives, especially since such public expenditures are currently being curtailed.

Avoidance is one alternative, and it may be that there is some better way of front-end loading the marriage process so that divorce is less frequent. Since divorce represents the (often messy) dissolution of the marriage, perhaps the marriage licensing processes need to be reviewed, or the marriage "contract" needs to be better defined. This is evident in the use of the "prenuptial agreement", where the orderly dissolution of the marriage is presupposed and accommodated. Although divorce disputes aren't completely averted by virtue of the existence of a prenuptial agreement, such agreements represent a desire to minimize the likelihood of future disputes.

3.8 Land Use Planning - Dispute Avoidance in Action

Practical conflict avoidance may be an evolutionary matter, such as in the manner described previously concerning the curtailing of land titles litigation by engineering real estate transactions to exclude litigation as much as possible. However, minimizing or avoiding conflict is the basic premise in the field of land use planning. Since Hippodamus⁷⁸, then through Industrial Revolution(ized) Britain, to our environment-conscious present-day world, land use planning has always had as its

⁷⁸ Hippodamus, credited with the "planning" of Athens, is regarded in the land use planning profession as the "Father of Planning".

underpinning the need to minimize or avoid conflict. Inherent in land use planning is that people do not necessarily carry a right to do as they wish with their land; rather, they can do so within a prescribed regulatory context which presupposes minimizing or avoiding conflicts. This is akin to the "harmony" approach discussed previously. While some may denounce the inherent pressure for conformity, this would indicate a difference of opinion as to which is more relevant, the right of the individual or the interest of the community. In land use planning, the communal interest overrides that of the individual.

To take a historical perspective, one need only to understand the social problems encountered during the Industrial Revolution in England to understand how land use planning was applied to resolve conflicts. Without regulatory frameworks in place, urban England experienced exponential population growth with the advent of the Industrial Revolution. Along with this demographic change came related problems. People living in squalor, absent such health-related amenities as clean water and septic disposal, resulted in widespread disease, high infant mortality rates and resultant public health risks to all of the populace, even if they were removed from these poor living conditions. The rights of the individual (i.e. economic ruling classes) to exact greater utility while disregarding public concerns such as health was the rule of the day. The conflicts were the function of land "over-use". Examples of this included noxious industrial uses adjacent to overcrowded residential activities and drinking water supplies doubling as septic and industrial waste disposal areas. The result was

the application of extensive land use planning, and the future avoidance of public health and safety problems. Providing for health, population density, and building standards meant that past problems would not be repeated.

Most conflict avoidance in the generic land use field is rather straightforward. For example, residential activity should avoid heavy industrial areas, thereby minimizing future problems associated with pollution, property damage claims and health care. Or sanitary landfills should not be located in close proximity to a source of communal (or individual) drinking water supply, thereby avoiding legal actions caused by contamination of water supply, or the costs associated with having to correct the problem.

In contemporary contexts, land use planning is locally, regionally, and nationally applied as a conflict avoidance or minimization technique. The conflict(s) being avoided or minimized are those which would result from unplanned development activity or from possible ill effects of human activity on natural environments. For example, designating environmentally significant areas for passive or conservation purposes is a common approach to resolving the conflicts which may arise from human activities in such areas (e.g. forestry practises, hunting and fishing, mineral resource extraction). The intent of such exercises can be either to minimize the effects of human activity on nature, or human activity on other humans. A quick scanning of the National Geographic magazine attests to the commonplace nature of

land use planning as a conflict avoidance tool. Whether the application is in Northern Australia for the protection of the Aboriginal way of life and the unique ecology that supports it,⁷⁹ the protection of the California desert from human-affected degradation,⁸⁰ or understanding how unplanned (and detrimental) activities are now being addressed with land use solutions,⁸¹ land use planning is utilized extensively as a conflict avoidance (or minimization) method.

However, it is not to be construed as a panacea for dealing with conflict. While "planning" is done, it is inevitable that there will be differing interpretations of the intent of the exercise, the best outcomes, or how it responds to changing circumstances. In this regard, there will be additional issues not contemplated by the planning exercise, issues which may need to be resolved. How these are approached, and the frequency of having to deal with such items, must also be considered.

Whether it is points of law (e.g. rules of natural justice, alleged improper exercise of a delegated authority) being tested in the courts, or the expert application of planning law and principles by the appropriate administrative tribunal, the key is that the planning exercise is intended to minimize or avoid the need for such determinations.

⁷⁹ Cathy Newman, *"The Uneasy Magic of Australia's Cape York Peninsula"*, National Geographic Vol.189, No.6, (June 1996) pp.2-33.

⁸⁰ Michael Parfit, *"California Desert Lands - A Tribute to Sublime Desolation"*, National Geographic, Vol.189, No.5, (May 1996) pp. 54-79.

⁸¹ John G. Mitchell, *"Our Polluted Runoff"*, National Geographic, Vol.189, No.2, (February 1996) pp. 106-125.

For people to recognize land use planning as a conflict avoidance mechanism may require some changes in approach. Management theorists, such as Michael Hammer,⁸² are advising that simply trying to adjust old methods of doing things may be inappropriate, and there is a need to question whether the current method (modified or otherwise) of handling a particular challenge is at all appropriate. Land use planning may provide an alternative method for addressing conflicts (i.e. with the aim of avoidance) which are currently the subject of adversarial resolution procedures in individual cases. This will be the focus of Chapter 6, where land use planning solutions are applied to the current public/judicial administration issue of assuring physical access for persons with disabilities.

In terms of applying conflict avoidance to physical access questions, through land use planning solutions, the view of ADR as an "either/or" consideration (i.e. either judicial decision or settlement) must be recognized as too limited. There must be, as Hazard has outlined, a more open-minded approach to the problem. We must be prepared to review this type of question not only as one which considers is there an alternative method of resolving the dispute, but whether there is an alternative to the dispute itself. Conflict avoidance is an alternative to conflict. In this way, better informed and more comprehensive solutions can be assessed. By considering conflict avoidance as a viable alternative methodology in any assessment of conflict resolution

⁸² See Michael Hammer, *"Reengineering Work: Don't Automate, Obliterate"*, 68 Harvard Business Review 104-112 (July/Aug 1990).

practises, such an assessment would be a true social science exercise, where all alternatives are considered.

Chapter 4 - Access: Defining the Problem

The issue of assuring physical access for persons with disabilities is, in theory and law, grouped under the rubric of discrimination. This chapter will concentrate on discussing discrimination in general, and then move to distinguish between the various types of discrimination. The distinctions will focus on the difference between equal treatment and truly equitable treatment. The remainder of the chapter will be concerned with the legal, political and economic justifications for assuring access, especially as it relates to citizenship. For persons with disabilities, access is the key to realizing citizenship.

Before any such assessment can be provided, however, it is necessary to provide some definitions as frames of reference. Since the focus of the discussion is on people with "disabilities", it is imperative that such a group is properly identified. Also, since the prefix of the term "disability" (i.e. "dis") denotes an opposite or negative connotation, the norm (i.e. "ability") must be understood. According to the Oxford Dictionary,

ability *n.* 1. the quality that makes an action or process possible, the capacity or power to do something.⁸³

⁸³ The Oxford Large Print Dictionary, (Toronto: Oxford University Press, 1991) p.2.

disability *n.* something that disables or disqualifies a person, a physical incapacity caused by injury or disease.⁸⁴

The interesting observation to be made from a comparison of the two definitions is the reference to the disqualification of someone who has a physical incapacitation. This is the core of the access issue, in that where physical access is not assured, a person with some form of disability is effectively disqualified from accessing that service/activity, or exercising his/her rights as a citizen. Also interesting is the reliance on the term "physical", since in the context of "access", mental impairments may impact a person's ability to understand language or symbols, or there may be invisible disabilities, such as angina or arthritis, that can affect mobility.

Another term requiring a clear definition is "access". In the literature on the subject, the terms "access" and "accessible" are used seemingly interchangeably, but The Oxford Dictionary, for one, makes a simple and clear distinction which is important for the purposes of this study. To explain,

access - *n.* 1. a way in, a means of approaching or entering. 2. the right or opportunity of reaching or using...⁸⁵

accessible *adj.* able to be reached or used.⁸⁶

Evident in the above definitions is that there is the theoretical "right" as well as the practical application of the right. This is important, because what leads to possible

⁸⁴ *Ibid.*, p.228.

⁸⁵ *Ibid.*, p.4.

⁸⁶ *Ibid.*, p.5.

discriminatory treatment is that, while the right may be defined, its application may be a more difficult practical consideration.

Oxford defines discrimination (as the noun for the verb "discriminate") as "to make a distinction; to give unfair treatment, especially because of prejudice..." For our purposes, however, a more elaborate definition is needed, such as that provided by McIntyre J., in the Supreme Court of Canada decision in the matter of Andrews v. The Law Society of British Columbia:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.⁸⁷

This definition from McIntyre J., is more helpful because it connects differential treatment to the personal characteristics of a group or individual (e.g. characteristics such as physical mobility limitations or impairments). It also distinguishes that the treatment isn't simply unfair, but that compared to other persons, the treatment creates a disadvantage for some who are identified by a certain personal characteristic. The definition supplied by McIntyre J., is the legal standard, as opposed to the more generic consideration displayed in the Oxford definition. And, perhaps most importantly from a legal perspective, the definition does not require that intent be shown to exist in order to establish a particular event/incident/practice to be

⁸⁷ [1989] 1 S.C.R. at 174.

discriminatory under the law. Effectively, there can be all sorts of discrimination going on (e.g. I discriminated against the rest of my wardrobe when I chose the clothes I am currently wearing), but those discriminatory acts which affect the rights of people are those which concern society through the law, regardless of whether or not such acts are the product of prejudice or intent.

4.1 Three Types of Discrimination: Direct, Constructive and Systemic

There are essentially three forms of discrimination: direct, constructive and systemic. Each of these needs to be distinguished. "Direct" discrimination is that which most lay people understand, as it is the form most commonly understood to be discrimination. Classic forms of direct discrimination would include the following: 1. an employment advertisement stating that "Canadian citizens only" need apply; or 2. a golf club whose membership policy clearly states that women are not permitted to be members. In the first example, all persons who were not Canadian citizens have been directly targetted for the discriminatory treatment; in the second example, all women would be directly targetted.

Constructive discrimination, or "adverse effect" discrimination, is that which concerns the effect of a particular practice. In Canada, the United States and England, both statute and common law developed to prohibit unintentional discrimination that results from the imposition of a seemingly neutral requirement that disproportionately affects

a particular group.⁸⁸ A good anecdotal illustration of this is the 12 Courthouse steps analogy. If the entrance to the courthouse requires that every person wishing to enter the building must ascend 12 steps, then that is a seemingly neutral requirement, since it applies to everyone. However, under an analysis of this requirement against constructive discrimination, it would appear that there would be an adverse effect on all persons who exhibit possible visible mobility problems (e.g. unsteady gait), reliance on an assistive device for mobility (e.g. wheelchair), or a possible invisible impairment (e.g. acute angina). In effect, the overarching neutral requirement (i.e. everyone must ascend the 12 steps) may result in an unintended disadvantage to certain persons because of their particular personal physical characteristics.

Systemic discrimination is the third type of differential treatment to be used for this analysis. While the terms "systemic" and "constructive" are often referenced as one and the same,⁸⁹ there is an important distinction to be made. According to Oxford Dictionary, systemic is defined as "of or affecting the body as a whole."⁹⁰ This definition implies something that is widespread, such that under the rubric of discrimination, a particular practice is so widespread that it affects everyone who is identified by one or a set of personal characteristics. Using the "12 courthouse steps"

⁸⁸ Judith Keene, Human Rights in Ontario, (Toronto: Thomson Canada, 1992), p.115. See also pp. 115-141.

⁸⁹ *Ibid.*, p. 397.

⁹⁰ The Oxford Large Print Dictionary, (Toronto: Oxford University Press, 1991) p.830.

example, this constructively discriminatory practice evident at one courthouse would adversely affect persons who had physical limitations and needed to access that particular courthouse. The systemic application would be where all courthouses everywhere (e.g. in Ontario) had the same 12 steps requirement, whereby the constructively discriminatory practice is now adversely affecting all persons in Ontario who have mobility problems, instead of only those mobility impaired persons in one geographic location.

There can be overlap between the three. For example, an allegation of direct discrimination may also involve issues of constructive or systemic discrimination, in that one person may claim that they, as an individual, were directly discriminated against because they (with an individualized mobility impairment) could not mount the 12 courthouse steps. However, this same problem may have been experienced by people with any variety of mobility problems, whereby the one barrier (i.e. 12 steps) also works against an entire group, and is thus constructively discriminating. In essence, the barrier is not confined to the individual claimant, but the allegation of direct discrimination may be the catalyst to considering the wider societal problem caused by the existence of the 12 courthouse steps. This is of vital importance for case management in the forums where such disputes are considered, in that the reactive approach of dealing with each individual claimant may be better handled with a more proactive (and alternative) approach.

4.2 Substantive Equality Theory

To the uninitiated, the 12 steps example is evidence of equality, since all persons are equally treated to the same 12 steps. However, the idea of evenly applied rules does not necessarily assure equality in results. According to the Supreme Court of Canada, "... the interests of true equality may well require differentiation in treatment."⁹¹ The true test of equality is based on a consideration of the impact on the individual or group concerned.⁹²

Evident from the notion that true equality may require intended differential treatment, is that the means by which true equality can be affected is through some form of remedy. Also, the effectiveness of the remedy may reflect the way in which access issues are viewed (i.e. direct, constructive or systemic discrimination). As will be discussed in the next chapter, the approach (and processes utilized) to remedying access concerns may not provide the desired result (i.e. true equality).

⁹¹ R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R., per Dickson J., at p.347.

⁹² Andrews v. Law Society of British Columbia, [1989] 1 S.C.R., per McIntyre J., at p.185.

4.3 Justifications for Assuring Physical Access for Persons with Mobility

Impairments

To this point, the terms disability, mobility impaired, and invisible impairment have been used, but these are superficial categorizations of a wide range of ability differences. To be sure, the Human Rights Code (of Ontario) defines "because of handicap"⁹³ as encompassing the following:

"because of handicap" means for the reason that the person has or has had, or is believed to have or have had,

i) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device,

ii) a condition of mental retardation or impairment,

iii) a learning disability or a dysfunction involved in one or more of the processes involved in understanding or using symbols or spoken language,

iv) a mental disorder, or

v) an injury or disability for which benefits were claimed or received under the *Workers' Compensation Act*.⁹⁴

⁹³ It is noted that the term "handicap" is largely in disuse, as it is considered offensive to those so identified. According to Mr. Peter Zein of the Niagara Centre for Independent Living, the term originates from Britain where disabled persons went "cap in hand" or begging. (From sensitivity training provided by Mr. Zein, November 1993.)

⁹⁴ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 10(1)(b).

While some of the above conditions may not cause mobility problems, many do. For example, while a person may not have mobility restrictions but does have problems understanding language or using symbols, access problems may still be evident.

Also, there is no requirement that the various impairments be permanent. For example, a bodily injury caused by a motor vehicle accident requires the injured person to rely on crutches (i.e. "remedial appliance or device"). Such a person, even if only temporarily, may have physical access issues. This can be readily understood in the context of our "12 courthouse steps" scenario. Before the accident, the individual hardly recognized the steps as anything more than a way to reach the elevation required to get in the front door. After the accident, those same steps could form an effective barrier to reaching the door (or accessing the service offered beyond that door).

An interesting reference in the Code is made to the *Workers' Compensation Act*. The protection provided by including this definition is so that a person will not be disadvantaged for having claimed or received Workers' Compensation benefits. This means that there may be some cross-functioning, or cross-supports between the two pieces of legislation. This is important in the context of this study, because if the Code can incorporate protections from other legislation, then it would be reasonable to expect that other legislative frameworks can be used to help enforce the requirements of the Code. As is discussed in Chapters 5 and 6, this is not only a

reasonable expectation, it is already provided for in the Code and is carried out in practice.

While the case law surrounding "because of handicap" is still developing,⁹⁵ for the purposes of this analysis, the key is that mobility and access issues are well beyond the wheelchair. The wheelchair is the symbol used to denote "handicapped" parking or restrooms, so consciously or otherwise, that tends to be the focus of what able-bodied people think of when (and if) they ponder access questions. However, access concerns can be very widely shared, from elderly persons whose mobility has deteriorated with time, to people who are ambulatory (i.e. people who may be able to move under their own power, but with noted difficulty, such as a paraplegic or a person with muscular dystrophy), to the recovering motor vehicle accident victim, to a recent parent who pushes a stroller (and experiences the same physical access barriers as the person in the wheelchair).

Access is a systemic problem, one which needs to be remedied through the application of substantive equality principles. To illustrate the systemic nature of the access problem, it is helpful to consider the types of activities that a disabled person may be disqualified from, as a result of their personal characteristic(s). If workplaces are not required to be made accessible, then there is a systemic barrier to

⁹⁵ See for example Ouimette v. Lily Cups Ltd. (1990), 12 C.H.R.R. D/19 (Ont. Bd. of Inq.) and Elkas v. Blush Stop Inc. (1994), 25 C.H.R.R. D/10 (Ont. Bd. of Inq.).

employment. If services and related facilities are not made accessible, then there can be systemic barriers to the disabled person's freedom of consumer choice, political and civic activism, volunteerism, the arts, education, health, etc. If housing is not constructed to be accessible, then there may be barriers to choice in terms of location, style, or affordability.

To be denied housing, education or health care would be contrary to the liberal notion of citizenship, since these services would qualify as social entitlements envisioned by the modern liberal theory of citizenship. The same is true where a person is denied access to employment, as this is considered an economic entitlement. Inaccessible civic facilities (e.g. government offices, constituency and/or election campaign offices, convention centres, courts) or places such as union halls and service club meeting locations mean that persons with disabilities may not be able to participate in related political and civic activities, participation which republican citizenship theory claims is integral to exercising the rights of citizenship. Also, as noted in Chapter 1, there is an increasing demand for volunteerism due to fiscal restraint. Volunteerism is, according to republican citizenship theory, a civic activity that is the responsibility of citizens. Absent a systemic access remedy, persons with disabilities are effectively barred from meeting this citizen duty.

The integration of persons with disabilities into community life (i.e. to realize citizenship) has also been expressed by the courts. According to the Supreme Court of Newfoundland,

It is the policy in Canada to integrate the disabled into the life of the community in every way possible. The elimination of physical barriers to such integration, is at the very heart of the Act and regulations.⁹⁶

Politically, persons with disabilities represent an increasingly effective lobby group. In Canada, this lobby is manifested in the form of the Canadian Association of Independent Living Centres (CAILC) and the Canadian Association of Community Living (CACL). Independent living centres are evident across the country, and are essentially self-help and "consumer" support organizations. This is well expressed in the slogan of the Niagara Centre for Independent Living, "An organization run by and for persons with disabilities."⁹⁷ Services from employment counselling, to "peer support" and "information and referral" are offered to assist people in living independently.

The approach taken by the independent living movement is anything but self-pitying or charity seeking. In a review of the Roeher Institute's 1993 publication Social Well Being: A Modest But Radical Proposal, Tanis Doe observes:

⁹⁶ Atlantic Shopping Centres v. Newfoundland (1988) 9 C.H.R.R. D/4836 at 4339.

⁹⁷ Niagara Centre for Independent Living, "Newsletter", Vol.5 No.4, (Welland, Ont., Autumn 1993).

Despite the gains of the *Charter of Rights* in modern years, Rioux identifies and explores the holes in the safety net.... Our 'sacred' trust of social welfare is designed more like a bungee cord than a safety net. It is insecure, discretionary, restrictive, stigmatizing and inequitable.

Equality, a new idea? Democratization, a radical idea? Self-determination, an original concept? People with disabilities have been collectively arguing for these goals for years....

When people with disabilities ask for 'special treatment' it is couched in the language of accommodation, integration, equity and rights. People with disabilities ... have moved away from being passive recipients of charity to being active citizens in their community. With the consciousness-raising and technological changes, expectations have risen and people with disabilities have demanded access to the community. But social and political response to these demands have been slow, fragmented and ineffective, at best.⁹⁸

The means by which the Roeher Institute (a Toronto think tank) proposes to affect such change is discussed in some detail in Chapter 5. The important observation to be made from the above is that current processes haven't succeeded in assuring access to the community.

This has also been acknowledged up by mainstream media. To illustrate:

Every reader now in perfect health may tomorrow become a disabled person as a result of some accident or illness. Virtually all of us will become disabled as old age erodes our faculties and strength.

Once, most societies dealt with those disabled permanently at birth or from an early age by institutionalizing them. They were sent to poor houses and institutions for the so-called retarded, to get them away from our sight.... [O]ur response evolved into one of charity. We wanted the disabled to be well looked after - in hospitals, sheltered workshops, foster homes - but to continue to remain out of our sight.

⁹⁸ Tanis Doe, Abilities, "Review", (Toronto, Fall 1994) p.16.

Today's demand by the disabled is fundamentally different. It is for citizenship.... [T]his issue is whether we are prepared to develop a social system that will enable disabled persons to "participate in the economic and social lives of their communities."⁹⁹

This statement is a direct reflection of the liberal view of citizenship, as it refers to economic and social considerations as being elements of citizenship. According to Richard Gwyn, these keys to citizenship are not currently in place for persons with disabilities.¹⁰⁰

Perhaps the simplest (and most direct) statement of disabled persons on the importance of access was the theme for the Niagara Centre for Independent Living's (NCIL's) Conference in November, 1993. The theme was "Access Means Independence", and it was drawn from a statement made by Traci Walters, who at the time was Executive Director of the centre and is now Executive Director of the national centre in Ottawa. In 1992, Walters stated that "No one organization or one leader can eliminate all barriers in society but making leaders of all of us will bring changes like never before."¹⁰¹

⁹⁹ Richard Gwyn, *"Disabled Need Opportunity to Become Full Citizens"*, *Toronto Star*, (October 5, 1994) p.A23.

¹⁰⁰ *Ibid.*, p.A23.

¹⁰¹ Niagara Centre for Independent Living, *Newsletter*, Vol.5, No.4 (Welland, Ont., Autumn 1993).

The political organization of persons with disabilities, at the international level, is well outlined by Diane Driedger in The Last Civil Rights Movement. It discusses efforts carried out worldwide, from Scandinavia in the late 19th Century to Singapore in 1981, in organizing and gaining recognition for disabled people's issues. So prominent is this recognition, that the group Disabled People's International has advisory status with the United Nations (as does the World Blind Union), and prompted the U.N. to designate 1981 as the Year of the Disabled.

Although persons with disabilities are organized politically, and therefore exhibit the political activity inherent in the republican view of citizenship, this is a dubious distinction. The political activity focusses on issues affecting disabled persons. They are politically active because of their disabilities, not despite them. The true test of the republican view of citizenship would be where persons with disabilities participate politically for reasons beyond drawing attention to their personal physical characteristics. Persons with disabilities are found in every race, colour, ethnic and cultural group; they are men and women; they have children and parents; they are heterosexual and homosexual; and, they can have the same variety of political ideological views as society as a whole. Although persons with disabilities pervade society, their political focus is still at the stage of a civil rights movement. Other political causes are relegated secondary status for persons with disabilities, not due to apathy, but because they do not have the same degree of freedom (that comes with

assured physical access) as able-bodied citizens do. With access comes the ability to become politically active citizens for reasons other than disability.

Economics provides another justification for assuring full access for persons with disabilities. As discussed in Chapter 1, liberal citizenship theory suggests that economic participation is a quality of citizenship. However, in order to participate, a person needs access to the economy. One of the principal avenues for this is employment. But if all, most or some places of employment are not physically accessible to persons with disabilities, then there is a barrier to economic participation.

Persons with disabilities are consistently grossly underemployed compared to other working age people. According to Supply and Services Canada,¹⁰² 31.2% of disabled women in Canada are employed, 6.4% are unemployed, and 62.5% are not in the labour force. For non-disabled women, 60% are employed, 7.9% unemployed, and 32.1% are not in the labour force. For men, unemployment is almost identical for disabled (8.4%) and non-disabled (8.3%). Yet there is roughly a 30% disparity for the men (as with women) between employed (50.8% for disabled men and 79.8% for non-disabled men) and not in the labour force (40.8% for disabled men and 11.8% for non-disabled men). According to the report, "People who are not in the

¹⁰² Government of Canada, Persons with Disabilities in Canada in 1986, (Ottawa: Minister of Supply and Services, 1993), Table 9.

labour force are those considered 'unfit' for work, those who have chosen not to work and people resigned to unemployment, having become discouraged by consistently fruitless attempts to find a job."¹⁰³ It is suggested that the key to this disparity is a lack of physical access for many workplaces. Without systemically-effected access for places of employment, much of this disparity will undoubtedly remain.

At the Niagara Centre for Independent Living (as with all CAILC members), persons with disabilities are called "consumers". This is a simple reflection of their individual role as consumers of service(s), or put another way, as economic citizens. However, the concept goes well beyond that. From a review of the literature on disability issues, most of which was found in periodicals and newsletters, it was clear that the notion of the disabled person as a consumer has not been lost on entrepreneurs and tradespeople alike. Advertising spots in the periodicals suggest a fledgling marketplace, one where there is competition among suppliers for everything from specialized clothing, to assistive devices for the home and office, to customized sports equipment, to contractors who offer "barrier-free" construction designs to meet individual needs.

The disabled person as consumer argument (i.e. as an economic citizen) is one which is well understood by the tourism industry. In a brochure advertising the State of Illinois as a tourist destination, the following is specifically highlighted: "All casino

¹⁰³ *Ibid.*, Comment, attached to Table 9.

decks aboard the Par-A-Dice are handicapped accessible with a blackjack table designed for our players with special needs."¹⁰⁴ At Daytona Beach, Florida, the local government "has acquired several wheelchairs known as Beachchairs to make that city's famous beaches accessible to physically challenged visitors."¹⁰⁵ What the tourism industry promotes as a marketing tool (i.e. accessibility), may be lost on other business sectors. This is well expressed in the following:

My partner has a disability and uses a wheelchair. When we pass a shop with steps out front, we don't go in. It's as simple as that.

The message seems to be sinking in very slowly. Too many business owners still don't believe that there's more than just social consciousness involved in putting a ramp in front of an establishment.... The attitude of some shopowners is that because my partner has the disability, their inaccessibility is his problem, not theirs.

They're still not getting it - by refusing to make their premises accessible, they are refusing the money of a whole range of potential customers.... What they don't understand is that when they deny access to my partner with his wheelchair, they are not just turning away his business. They're turning away mine.¹⁰⁶

In the writer's own work experience, as a human rights officer, one enterprising individual was encountered whose focus is directly concerned with filling a niche concerning access. The contractor specializes in installing accessible elevators, chair

¹⁰⁴ Illinois Department of Commerce and Community Affairs, *"Illinois 1996 Visitors Guide"*, (Chicago, 1996) p.13.

¹⁰⁵ Toronto Sun, "Disabled Get Access to the Beach", (Jan. 3, 1996) pg. 38.

¹⁰⁶ Lisa Bendall, "Is Your Business Counting on Customers with Disabilities?", Toronto Star, (May 29, 1995), p. A19.

lifts (for stairs), and customizing interiors and exteriors. Churches, landlords, office building owners and service clubs are all among his clients. Even in the most basic understanding of the free-market system, where there is demand, supply will rise to meet demand. It may be that, if "access" can be assured on a more systemic basis, such businesses could represent a growth industry.

Demographics would also support an argument for the economic viability of assured access. In an article from the Canadian Mortgage and Housing Corporation, this concept is well illustrated:

"A new "User-Friendly House" in British Columbia embraces the future - affordably. And the market for this kind of barrier-free, adaptable and automated housing could explode.... Why does this house hold such great market potential?

First, some introductory words from the demographers: Today, 4.2 million Canadians have some form of disability. Moreover, the "baby boom" will soon become the "senior surge", as the bulk of Canada's population ages. By 2031, the number of people over the age of 75 will have increased from 1.3 million today to over 4.4 million.

Technology experts also have a few things to say. The brave new emerging technologies ... will make the lives of many Canadians more secure, comfortable and fulfilling. Yet today's homes are simply not equipped to embrace the full potential of all the new technology.

The User-Friendly House meets demographic and technology trends head-on - in an era in which people want it all, but only if it's cost effective.¹⁰⁷

¹⁰⁷ Canada Mortgage and Housing Corporation, "A House Whose Time Has Come", Abilities, (Toronto, Fall 1994), pg. 40.

With government cutbacks being a trend pervading virtually every public policy and program area, disability issues are not immune. With reduced resources, and possibly reduced public agenda visibility, disability issues such as the systemic access problem will be even more difficult to affect with the current approach(es). This concern is well expressed by Donna Plonski, current Executive Director of the Niagara Centre for Independent Living:

Recently, the Standing Committee on Human Rights and the Status of Disabled Persons submitted a report to the federal government called "The Grand Design: Achieving the 'Open House' Vision." Part of this committee's role is to advise the federal government on issues affecting persons with disabilities. The report strongly urged Ottawa to continue to take a leadership role in supporting persons with disabilities....

In May, the federal government released its response to the report called "An Open House to All: A Shared Responsibility." This response has sent shock waves throughout the disabled community. Although the report says it plans to continue to take a coordinated approach on disability policy, programs and funding, there has been no concrete evidence of that promise....

The government will not commit to appoint a Secretary of State responsible for disability, nor will it commit to renewing a strategy for the integration of persons with disabilities. The economic and social barriers facing people with disabilities will not simply disappear because the government is no longer interested in supporting people with disabilities. The federal government has both a responsibility and an obligation to support the citizenship rights of all Canadians, including those with disabilities.¹⁰⁸

The indication from Ms. Plonski is that social and economic barriers for persons with disabilities are citizenship issues. These are the same terms used by liberal citizenship theorists.

¹⁰⁸ Donna Plonski, "Federal Government Changes Its Tune", Niagara Centre for Independent Living, Newsletter, Vol.8 No.2, (St. Catharines, June 1996) pp.1,2.

Finally, there is the ethical consideration behind assuring access (and in turn assuring full citizen rights). For persons with disabilities (in Canada), such rights are given voice in the federal *Charter of Rights and Freedoms*, and in provincial human rights legislation. An example of the rationale for this assurance is found in this extract from the preamble to the Human Rights Code, as follows:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of the climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well being of the community and the Province;¹⁰⁹

All other provincial human rights laws contain similar language. It is interesting to note that in mentioning "community", in the sense of feeling a part of it and contributing to its well being, there is no distinction made between the economic and social aspects of community and the political and civic aspects, which is the distinction between liberal and republican citizenship theories. Both theories appear to be accorded equal importance in terms of the intent of the legislation.

From the perspective of assuring access for persons with disabilities, words such as "able to contribute fully" may have a hollow ring, especially given the observations of

¹⁰⁹ Human Rights Code, R.S.O. 1990, Chapter H.19, Preamble.

groups such as the Roeher Institute. The analysis then must turn to ways in which access issues are reconciled in the public arenas, in order to assess effectiveness of such methods in effecting a systemic remedy to the systemic access problem, and if these methods meet the intent of rights law and if the methods can or need to be changed.

Chapter 5: Physical Access for the Disabled - Proactive or Reactive?

Ontario currently uses the adversary process to deal with physical access for persons with disabilities. This reactive system has failed to bring about a systemic remedy to the access problem. While the next chapter will assess the appropriateness of land use planning to redress this conflict, it is necessary at this point to outline how these disputes are currently addressed, and the regulatory framework currently in place to achieve this end. The purpose of this chapter is to outline and assess the current legislation and administrative process in place to assure physical access for persons with disabilities. This will include discussion of Canadian law and the recently enacted Americans with Disabilities Act, and a review of two particular cases from Ontario and one from Saskatchewan.

In 1948, Canada signed the United Nations Universal Declaration on Human Rights,¹¹⁰ thereby committing the Canadian polity to taking legislative steps to addressing human rights issues. Since Canada is a federal state, the signing of the declaration meant that where the British North America Act, 1867 (now the Constitution Act, 1867) divides jurisdiction between the federal and provincial levels, human rights issues would also be addressed along those same lines of authority. The

¹¹⁰ *The Universal Declaration of Human Rights*, United Nations, was adopted and proclaimed by General Assembly resolution 217A(iii), December 10, 1948.

result has been the creation of one federal, ten provincial and two territorial human rights commissions.

The *Canadian Charter of Rights and Freedoms*, and federal and provincial human rights legislation all provide for equality on the basis of many potentially discriminatory grounds, including disability or handicap. The aim of such legislation is to provide for equity in most facets of social interaction, from employment, to education, to utilizing public services (from restaurants to personal services to government offices). Where the protection concerns physical disabilities, provincial and federal human rights legislation prescribes the methodology for resolving complaints.

The inclusion of a basic protection in the *Charter* carries the weight of constitutional authority and applies to public spheres, but such protection does not apply to private conduct. Further, the specific human rights statutes have a quasi-constitutional status.¹¹¹ This is borne out by the paramountcy of human rights legislation over other Acts, which is clearly articulated in those laws. For example, Section 47(2) of the Human Rights Code states,

Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part 1, this Act applies and prevails unless

¹¹¹ From a discussion with constitutional lawyer Janet Minor, Ontario Ministry of Attorney General, November 24, 1995.

the Act or regulation specifically provides that it is to apply notwithstanding this Act.¹¹²

The various provinces have slightly different wording in their respective human rights laws, but the basic protection for persons with disabilities is evident in all of them. However, the method(s) by which that protection is assured, or the degree of assurance, can vary from one province to the next. To illustrate, Section 1 of Alberta's Individual's Rights Protection Act, provides a supremacy clause (i.e. paramountcy over other legislation), and provides protections for persons with disabilities in a number of social areas, including public accommodation and tenancy (at Sections 3 & 4). In Section 5, however, the Act states:

Notwithstanding section 1, no person who is the owner of, or is responsible for the use, occupancy, construction or alteration of, a building as defined in the *Safety Codes Act* shall, by reason only of the building, be found to have contravened section 3 or 4 as it relates to denial or discrimination on the basis of physical disability if he establishes that the building complies with the applicable requirements of the Act and the regulations under the Act.¹¹³

This effectively means that, provided the landlord or its agent can prove compliance with building legislation (and presumably related regulations), persons with physical disabilities can be discriminated against. There is no indication that compliance with the building legislation equates to assuring access for (or no discrimination against)

¹¹² Human Rights Code, R.S.O. 1990, Chapter H.19, Section 47(2).

¹¹³ Individual's Rights Protection Act, R.S.A., 1990, c.1-2, Section 5.

persons with disabilities. This is an interesting point for this analysis, as will be discussed in Chapter 6.

By comparison, Ontario's Human Rights Code does not provide a defence simply by proving compliance with building legislation (i.e. Building Code Act, R.S.O. 1990, or the regulations found in the Act). The test under Ontario law is that the defendant (i.e. respondent) must prove that assuring access for persons with disabilities (i.e. accommodation of the disability) will result in an undue hardship.¹¹⁴ To provide guidance on what constitutes "undue hardship", the legislation provides that "The Lieutenant Governor in Council may make regulations prescribing standards for assessing what is undue hardship..."¹¹⁵ There are, to date, no such regulations. This means that each case is assessed on its own merits, with undue hardship considerations being directed generally to issues of "...the cost, outside sources of funding, if any, and health and safety requirements, if any."¹¹⁶ With dwindling public funds, trends toward "doing more with less", and generally slow economic conditions, the ability to meet the subjective "undue hardship" test would appear to be less onerous. The result will be (among other things) less assurance of access for persons with disabilities. This circumstance also provides impetus to consider the

¹¹⁴ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 17(1a).

¹¹⁵ *Ibid.*, Section 48(a).

¹¹⁶ *Ibid.*, Section 17(1a).

current methods of assuring access, and how these may be changed to be more effective.

In both Alberta or Ontario, it would appear that the practical application of the legislation may belie the protection provided to persons with disabilities in the *Charter* and quasi-constitutional human rights laws.

As stated, the Ontario Human Rights Code¹¹⁷ prescribes an adversarial process, initiated by individual complaints, as the means of addressing discriminatory measures, including physical access for persons with disabilities. Within this framework, virtually all other potentially discriminatory grounds are accounted for. This includes matters of race, age, creed, marital and family status, gender and sexual orientation. Within the Human Rights Code, there are fifteen grounds, with "handicap" being but one. Under the rubric of "handicap", everything is grouped, from physical and mental disabilities, to invisible disabilities (eg. leukemia).¹¹⁸ Many of these issues do not concern physical access. This means that with limited resources, all allegations of discriminatory treatment are vying for attention in the same procedural framework.

¹¹⁷ As is the case with other provincial and federal human rights legislation in Canada.

¹¹⁸ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 10(b).

Adding to the problem, the legislation provides protection in five enumerated social areas. The term "social" in this sense relates to activities where there is going to be interaction between people. For example, one social area is employment, which in the jargon of citizenship theorists, is an economic activity. Another social area is "goods, services and facilities", which would include government. So in this social area, political activity is included.

Not all social areas represent access concerns for persons with disabilities. Further, not all allegations of discrimination on the ground of "handicap" are access issues. For example, where an employer is alleged to have failed to accommodate a diabetic, this is not an access problem, but it is placing concurrent demands on the same system. To illustrate this, statistics from the OHRC indicate that of 92 cases currently at the Board of Inquiry level, 13% were "handicap" issues, broken down as one in accommodation, eight in employment, and three in services.¹¹⁹ Not all of these matters are access issues.

Within that framework, there may be political or operational considerations giving more attention to some issues (eg. issues of race, HIV/Aids), whereby there is a prioritization of issues. In effect, the urgency of some forms of discrimination may

¹¹⁹ Ontario Human Rights Commission, *Report of Staff to the Commission, For Period Ending December 31, 1995*, (Toronto, March 1996) p.35.

be operationally greater than with others.¹²⁰ In this regard, each claim of discrimination, where the issue is one of lack of physical access, must "get in line" with all other matters, unless more pressing political or operational issues move some matters to the front of the line. One must ask, following Michael Hammer,¹²¹ whether this is appropriate at all, and is there a better way?

Also, apart from the priority-setting mechanism, there may be novel human rights issues that are pursued for reasons of political reactivity, or to help in defining the breadth and scope of rights law applications. As is well illustrated in the following passage, it may be that this will result in further restrictions on resources available to address the variety of access issues.

Ontario's Human Rights Commission has finally quashed a decade-old complaint against a variety store owner for selling adult magazines.... The Commission case against Four Star Variety Stores has cost taxpayers an estimated \$500,000 and the owner \$150,000 in legal fees.

It is contended the sale of magazines such as Playboy and Penthouse in corner stores creates a hostile environment for women and infringes their right of equal treatment because of their sex.... Chief Commissioner Rosemary Brown wrote in a one-page decision that "evidence" against the store owner and the "current state of the law" make further inquiry into the complaint "inappropriate".

Lawyer Peter Israel, who represents the store owner, called the decision "horribly frustrating. They've just totally wasted court time and taxpayer's

¹²⁰ Ontario Human Rights Commission, *Procedures Manual*, 1992, referring to "Priority Case Handling Criteria", (Toronto, 1992).

¹²¹ As discussed in Chapter 3 herein.

money." In its attempt to "push the envelope" of human rights protection, the commission became a "Draconian" persecutor, he said.¹²²

Access is not an issue requiring a "pushing of the envelope". It is well established in case law. The problem is that this systemic issue is being addressed incrementally, amidst a wide range of other issues of discrimination, some of which have been subjected to precedents, some not, and like the adult magazine issue, some which possibly never will (even after sizable expenditures trying).

Clearly, the current structure is reactive. The aim of human rights legislation is to affect equity and to ensure individual dignity.¹²³ One must question if the indignity caused by not being able to enter a building is rectified by the affected individual having to recount and combat this indignity through an adversarial legal process. This is further questioned when that adversarial process allows for a defence of "undue hardship" for having to assure access, despite the blanket assurances regarding equality provided by applicable legislation. This is not to suggest that the "undue hardship" defence is somehow untoward, merely to identify that the assurance provided at the constitutional (or quasi-constitutional) level is increasingly difficult to effect in practice.

¹²² Hamilton Spectator, "Human Rights Commission drops suit against store", Canadian Press, (May 10, 1996).

¹²³ Human Rights Code, R.S.O. 1990, Chapter H.19, Preamble.

Compounding this situation is that there are few recognized standards in Ontario for what constitutes access. Within a common law framework, this requires that each circumstance be assessed individually, in order to establish case law. To illustrate how problematic this may be, a recent decision was given concerning the applicable standards for a parking space for disabled persons.¹²⁴ The entire process required five years to complete, in order to ensure the complainant's dignity which had been offended five years earlier when she couldn't access a restaurant for lunch with friends.

As stated previously, the Human Rights Code does provide for opportunity to "endeavour to effect a settlement", which is basically a mediation procedure. This is a limited application of ADR, in that the alternative to mediated settlement is a judicial decision, and not an alternative to the process. Further, while one may perceive the individual rights tribunals that hear these matters as constituting a form of ADR, the alternative is merely the venue chosen. The process is still adversarial.

While ADR is given procedural application through pre-hearing settlement processes, a case management problem still exists in terms of backlog. Whether the result of changing demographics, inadequate resources, poor management or sheer volume, the alternative forum still exhibits the problems associated with the court processes.

¹²⁴ See Elliot v. Epp Shopping Centres Inc., C.H.R.R., Vol.21, Part 4, (January 15, 1995) D/333.

While attempts have been made to address the backlog, in Ontario's human rights context, the problems persist.¹²⁵

Delay in adjudication of human rights issues is a major contributor to the lack of success in effecting physical access for persons with disabilities. In commenting on the delay problem in July 1996, Professor Constance Backhouse observed the following:

The adjudication of this complaint added more than three years to the almost eight that can be laid at the foot of the Commission.

No one's interests are served by this sort of record, which is all too reminiscent of Charles Dickens' "Bleak House". The systemic practices which lie at the root of these delays require urgent alteration. It is sobering to reflect upon research compiled by anthropologists such as Frances Henry (an expert witness in this case) which concludes that racialized groups have found provincial human rights legislation almost totally irrelevant in reducing day-to-day discriminatory practices....¹²⁶

It is suggested that the same would hold true for issues of access for persons with disabilities. Waiting eight years, through an adversarial and piecemeal process, does little to remedy the systemic access problem. Perhaps by removing individual and

¹²⁵ In 1990, the Ontario Government set up a "Special Task Force" to clear backlogs on the Ontario Human Rights Commission's caseload. After some success was realized in terms of largely eliminating cases over four years old, the Task Force was finally disbanded in 1993. However, the backlog remains a constant concern, and it is growing, as shown in preliminary internal reports such as the Case Management Plan Report for Fiscal 1994/95.

¹²⁶ Narraine v. Ford Motor Company, et al, (unreported decision) Ontario Board of Inquiry, (July 25, 1996) pp.6,7.

piecemeal access questions, to the greatest degree possible, from the caseload of the Human Rights Commission and Board of Inquiry, delays associated with adjudicating and remedying other issues of alleged discrimination could be reduced as overall caseload would be reduced.

Recently, the OHRC has come under scrutiny for trying to address some of its backlog by using its legislated discretion to decide to "not deal with" complaints.¹²⁷ According to Bruce Porter, Executive Director of the Centre for Equality Rights in Accommodation (CERA), a Toronto legal clinic dealing with housing issues,

They're simply abusing their discretion under the code to dismiss cases where there's quite clear evidence of a violation under the [sic] human rights act. The Commission is essentially using [section 34 dismissals] as a way of eliminating the backlog."¹²⁸

Whether the above criticism is true (in whole or in part), or whether this represents a legitimate identification of matters that shouldn't be in the system, the effect on assuring access for persons with disabilities is the same. If the criticism is correct, legitimate access issues will be dismissed, resulting in continued lack of access. If the approach is to allow the commission to focus on more pressing issues, the result is to make competition among individual allegations of discrimination for tight resources that much more competitive. However, as will be discussed in Chapter 6, the use of

¹²⁷ As per Human Rights Code, R.S.O. 1990, Chapter H.19, Section 34.

¹²⁸ Now, "Decommissioning Human Rights", (Toronto, Oct. 5-11, 1995) pg. 19.

Section 34(1)(a) of the Human Rights Code may prove to be a boon to assuring access for persons with disabilities.

Still on the issue of case management approaches, a recent report from Alberta (concerning proposed changes to that Province's human rights law) would indicate current impetus for a proactive approach to assuring access:

The legislation would give the government the right to levy a bill against Albertans who, in the opinion of commission members, bring frivolous and malicious complaints against their employers and others. The bill would allow people who have a complaint lodged against them to claim costs for legal fees and other expenses.... Mr. Ghitter, a former MLA who helped bring in Alberta's current regulations, said a financial penalty would only prevent legitimate complaints.¹²⁹

As discussed in Chapter 2, one of the trends affecting administrative tribunals concerns reduced funding for legal aid. Again, this action in Alberta, if taken, would have the greatest impact on those least able to afford it. Further, given the deference to the buildings legislation in Alberta, such an approach does little to assure access for persons with disabilities. One is left wondering whether, if an Alberta landlord or business owner complies with buildings legislation, a complaint under the Individual's Rights Protection Act would result in the imposition of costs on the complainant. It would appear possible.

¹²⁹ Globe and Mail, "Group battling rights changes", (Toronto, April 17, 1996).

Ontario has enacted legislation to address a significant part of the systemic access problem. The Employment Equity Act¹³⁰ made provision for disabled persons (among other identified groups) to have greater employment opportunity. Discussing the degree of effectiveness or public acceptance of that Act is not within the scope of this study. What is important is that the New Democratic Party government of the day believed that it was reacting to a social ill (i.e. consistently disproportionately high unemployment for "historically disadvantaged" groups). The intent was, and possibly the result would have been, the removal of systemic barriers to persons with disabilities in the area of employment. This would be consistent with the modern liberal view of citizen participation being more along social and economic lines, whereby if a person has the economic means to provide for themselves, they are participating and contributing to society. No one disputed the fact that persons with disabilities were currently heavily underemployed compared to society as a whole.¹³¹

When fully implemented, the Act was to ensure "equitable" employment across the province. In order to effect such a state, workplaces would have had to be made accessible to persons with disabilities (who could otherwise be accommodated with

¹³⁰ Employment Equity Act 1993, S.O. Chapter 35.

¹³¹ It would be difficult to credibly dispute statistics such as those presented in Government of Canada's, Persons with Disabilities in Canada, 1986, particularly regarding workforce participation, income levels and occupational participation rates.

their limitations, and were qualified to the task at hand). The Act was in its infancy before the current government, making good on an election campaign promise, moved to scrap what had become known as the "Quota Law".¹³² That legislation is no longer available as a tool to effect at least that aspect of the systemic remedy for assuring the right of access for persons with disabilities.

Not only has this systemic remedy been removed, but

When Mike Harris repealed the [sic] employment equity act, he assured Ontarians they could fight discrimination through a strengthened Human Rights Commission. Now he has cut its funding by \$700,000, despite long-standing calls for more resources.

How can this be fair or practical when the commission has been struggling under its original mandate and Harris has constructively increased its work? Those dealing with the commission face unconscionably long delays. This year alone, as of March 31, the commission had a total of 2,899 complaints....

Even if the problem was administrative flabbiness, rather than a heavy caseload reflecting real discrimination, the Tories are moving backward. By cutting before reforming, they have no idea whether the commission can do its work with less cash. And the risk is that those who will pay the price are vulnerable Ontarians who are battling discrimination."¹³³

The writer shares the above concern. With the reduction in resources coupled with an increase in caseload, consideration must be given to assessing why certain functions are performed, and is there a better alternative methodology. The issue of

¹³² Formerly Bill 7, now An Act to Repeal the Employment Equity Act, S.O. 1995.

¹³³ Toronto Star, "Rights Body Wronged", editorial, (April 28, 1996).

access for persons with disabilities is one which could be approached much differently, with better results.

5.1 Americans with Disabilities Act

In the United States, the recently-enacted Americans With Disabilities Act (ADA)¹³⁴ attempts to tackle this problem. With reams of regulations attached, design standards are prescribed for everything from hallway widths, to sewer grates (so wheelchair wheels don't get stuck), to carpet piles. With the regulatory framework in place, anyone can be guided by the design standards (including land use planning and building standards professionals) in a proactive approach to ensuring physical access.

The ADA has its critics. However, the criticisms relate to the influx of cases being litigated under that Act, and the apparent ridiculous claims being made. The same arguments presented thus far in this analysis are applicable to the ADA. Requiring a litigious approach to each and every issue demeans the intent of the law. The writer is not espousing greater litigation as a means of assuring access; rather, the extensive regulations found accompanying that Act would prove very useful for any proactive approach to affecting access for persons with disabilities, especially in light of the adversarial, time-consuming and piecemeal process currently followed to get even one

¹³⁴ Government of the United States of America, Americans with Disabilities Act, Public Law 101-336, Washington D.C., July 26, 1990.

standard secured. This is illustrated (further along) through a review of the case of Elliott v. Epp Shopping Centres.

In Ontario, a private member's bill, entitled the Ontarians with Disabilities Act, (ODA) was tabled in 1994.¹³⁵ Apart from the indication that, being a private member's bill, the matter is not on the government's agenda, the Bill is considerably more limited than the ADA. There are no design standards prescribed in the form of regulations; the "access" is only in relation to government employment, services and facilities; and the administrative framework remains largely the same (i.e. individual complaints being assessed in an adversarial context).

This Bill, in the end, does little to add anything to the existing rights protections affecting access for persons with disabilities. This is largely evidenced by a provision of the existing Human Rights Code, as follows: "This Act binds the Crown and every agency of the Crown."¹³⁶ The ODA was intended to apply directly to government operations, but the Code already binds the government to compliance. This issue, of a better mechanism to assure access for persons with disabilities, remains unaddressed.

¹³⁵ Legislature of Ontario, Bill 168, a.k.a. "Ontarians With Disabilities Act (Bill)", 1994.

¹³⁶ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 47(1).

While other jurisdictions may be moving in a proactive direction regarding disabled access, Ontario and Canada generally operate in a reactive system of adversarial dispute resolution.

5.2 What is Needed?

Examination of individual court cases will help establish what types of costs are associated with litigating issues of physical access. Cases show the difficulties experienced with the existing adversarial and piecemeal process in terms of dealing with the systemic access problem.

The first case to be reviewed is Elliot v. Epp Shopping Centres. The case involved the complainant, Ms. Marjorie Elliott, a person whose mobility is largely provided by a wheelchair. She was attempting to find adequate parking for her lift-equipped van, so as to "access" a local restaurant for lunch with friends. The respondent, Mr. Epp, claimed that since he had had to (and did) comply with the zoning regulations and site plan requirements of the Town of Niagara-on-the-Lake (Ontario), and that such requirements did not compel him to provide the parking sought by the complainant, he therefore had a reasonable defence.

A complaint was initiated with the Ontario Human Rights Commission (OHRC) in 1988. That process, which included an investigation, a recommendation to the OHRC

to request the appointment of a Board of Inquiry (i.e. tribunal), the hearing by the tribunal, and the rendering of its decision, took over five years. The decision of the Board of Inquiry was that the complaint was meritorious, and the order of the Board (i.e. remedy) included small monetary (\$1,000.00) award to the complainant, plus the requirement that the respondent provide a parking space that met with the Board's ordered standards. In terms of furthering access concerns in the province (and/or across Canada), the decision resulted in one standard to be applied to parking. Enforcement of the decision, however, creates additional difficulties. The respondent failed to pay the monetary award, thus prompting a collections action by the OHRC.¹³⁷ Also, in terms of providing the parking space, this requires either monitoring by the OHRC or deferring enforcement to the Town of Niagara-on-the-Lake by-law enforcement personnel. However, the Board's order did not have the effect of changing the Town's zoning requirements (for enforcement across the municipality), rather it was a site-specific order. Theoretically and practically, for each time a person complained of a similar parking deficiency at a different site in Niagara-on-the-Lake, the process may need to be repeated unless a mediated settlement could be realized. Also, it is noted that there are over 800 municipalities in Ontario alone, thereby making the possibility of a repeated process very likely.

¹³⁷ Discussion with Mollie Kermany, Legal Assistant with the Ontario Human Rights Commission, November 18, 1994. The collections action is the responsibility of the Commission (at public expense), and is another process that could be avoided in respect to "access" complaints, if this systemic problem was adequately addressed through proactive, systemic remedies.

According to available information, the total cost to the Commission to conduct the Board of Inquiry comes to \$2,202.92.¹³⁸ In addition, 37 hours of investigator time were needed to investigate the complaint, the compensation for which is not included in the above cost figure. Then there is the cost to the litigants, for everything from travel to securing independent counsel (both parties did so). There is cost to the Commission with engaging a collections action. Administrative costs associated with reporting to the Commission, paying Commissioners' per diems to hear the matter (along with others the same day), Board of Inquiry costs associated with providing notices, mailing and courier costs and copying make it impossible to pinpoint the true cost, but it certainly exceeds the cited figure of \$2,202.92.

Then there is the emotional cost of not only experiencing the discrimination, but then having to fight the issue over a period of five years. There is also emotional and financial strain on the respondent for defending action that he thought was complying with the by-law.

All of the costs would appear to have been avoidable. The respondent tied his defence to compliance with local zoning and site plan regulations. This suggests that, had the municipal by-laws required a parking space similar to that eventually ordered by the Board, the respondent would have provided it, since by-law compliance would

¹³⁸ As per writer's request under the Freedom of Information and Privacy Act, R.S.O. 1990, request made November 18, 1994. Request is filed at the Ontario Human Rights Commission as File FOI 94-307.

have been a necessary precursor to receiving authorization to locate the shopping plaza. Requiring compliance after the completion of the construction would cause understandable discontent to the respondent. Further, in the writer's experience as a land use planner, developers will comply with regulations, provided they are given standards at the outset. Whether, in the case of access for persons with disabilities, the developer embraced access as a desirable goal or simply as a necessary cost of developing, the end result should be the same: assured access.

Another case concerning an access question is Patricia Barber v. Sears Canada. In this action, the complainant claimed that she was discriminated against by having to utilize a freight elevator to access the second floor of Sears' St. Catharines location. The argument was that by having to take the freight elevator the complainant was subjected to an indignity not imposed on able-bodied patrons. Other persons could use the escalators provided. The result was that the Board of Inquiry into the matter found in favour of the respondent, drawing a distinction between the existence of any access and none at all. The Board found that "it is not necessary for respondents to provide the most dignified form of accommodation as long as the form of accommodation is dignified."¹³⁹

¹³⁹ From a memorandum, Fiona Campbell, Counsel to Carl Dombek, OHRC Legal Branch Director, (September 12, 1994).

The cost (to the Commission) for arguing this matter before the Board was \$24,219.07.¹⁴⁰ The disparity in the cost of adjudicating this matter over Elliot v. Epp Shopping Centres may be attributable to the Commission using outside counsel. In this way, legal costs would be fully reported, whereby with in-house counsel, the salary costs are hidden. In addition, over 100 hours of investigation, plus the related administrative costs and costs to the parties all add to the impetus for finding out if there is a better way of making such determinations. All of this cost was generated over an existing, functional elevator, the only issue being was it the best possible method of assuring access and respecting dignity. It appears that this is a case similar to that litigation under the Americans with Disabilities Act that has drawn harsh criticisms. It is noted that this case does little, if anything, to deal with the larger systemic issue of access for persons with disabilities.

The Barber v. Sears case was also subject to a challenge for costs. While there was no finding to support the payment of costs by the Commission, the important thing to note is that having to defend against such actions (or motions regarding procedures, allegations of bias) or in judicial reviews, means that the allegation of discrimination may be a catalyst for incurring a number of related litigation costs. Where such disputes and their associated costs can be avoided, methods of avoidance need to be given serious consideration as alternatives.

¹⁴⁰ As per writer's request under the Freedom of Information and Privacy Act, R.S.O. 1990, made November 18, 1994. OHRC File 94-307.

In another case, this one from Saskatchewan, the access issue concerned a building under renovation. In this instance, the respondent claimed a defense pursuant to compliance with that Province's building legislation.

In 1991 Judith Ann Ryan filed a complaint alleging that the premises of the Collections Fine Art Gallery and Cafe ... are inaccessible to her because she uses a wheelchair.... She learned that some renovations were being made and phoned to find out whether the premises would be made accessible. When she was told that the renovations might not include provisions for accessibility, Ms Ryan filed a complaint.

Henry Ripplinger argues that he applied to the City of Regina and was granted a building permit for the renovations he planned and no accessibility requirements were imposed. Pursuant to the *Uniform Building and Accessibility Standards Act*, he argues, he is not required to make his premises accessible because the building ... was built before June 1988 and the floor space of the original building is less than 600 square meters.

The Board of Inquiry finds that the *Uniform Building and Accessibility Standards Act* does not override the *Code*. Indeed, if there is a conflict, the *Code* takes precedence.¹⁴¹

The indication from the above case is that, where applicable, access standards can be prescribed by more directly involved regulatory regime(s). Unfortunately, access standards are not prescribed in the building legislation, despite the "accessibility standards" reference in the title. It appears that the attempt has been made in Saskatchewan through building standards legislation; however, according to the Board of Inquiry, the legislature didn't go far enough. This is important in the context of this study, since the case law seems to suggest that resolving access issues means

¹⁴¹ Ryan v. Ripplinger, "Summary", C.H.R.R., Vol. 20, D/427.

resolving conflicts between potentially contradictory laws and/or regulations. Such issues are more suited to proactive legislative solutions.

In an article in Abilities magazine, Sarah Yates, the mother of a disabled child and wife of a disabled man, has recounted her troubles with trying to affect accessible home renovations in Winnipeg, Manitoba, where access issues were not enshrined in municipal building and zoning.

No city by-law difficulties would compromise the plans presented.... I obtained a building permit.... The challenges began immediately thereafter when our lawyer explained that the crescent had a caveat disallowing building on the first 50 feet of property from the street....

When we began to build outside, the folly of that decision haunted us. The neighbour to the left of us worried about his view and talked about a neighbourhood committee. My husband and our contractor met with the group of two to explain the reasons for our design and to try to find an acceptable compromise. Meanwhile, our contractor went around the small crescent to measure where houses, decks, garages and any other structures infringed on the 50 foot caveat.... Violations continue around the entire crescent....

I took our daughter across the road to meet the older lady.... Our presence must have embarrassed her and ultimately served to close the door on us. She refused to accept Gemma's charms and her obvious needs. She was terrified and resentful of our daughter's disability. Never before had I met with people who believed in "good work" - as long as it is kept outside their own neighbourhood....

If we fought on the constitutional issue of access for people with disabilities, we might have won the case, but already our lives were becoming unmanageable with the emotional, financial and time-consuming angst of the delayed construction.... I understood more personally the struggles of people who face racism.

The city council ordered a mediation meeting.... The neighbours suggested

that their compromise was to allow no construction. It looked like we had lost our battle. The city council seemed poised to sign away our access.¹⁴²

In the end, Ms. Yates resorted to politicking with the media in order to draw attention to their plight. In so doing, attention was also drawn to the physical disabilities of the daughter and husband. Also, it is noted that had the municipal council decided against the renovations, the Yates family would then be in a position to take more legal action (e.g. human rights complaint, civil suit against city, municipal board appeal). This would be ridiculous in the context of a constitutionally assured right. Without coordination of access requirements with land use planning provisions, these situations could be repeated time and time again.

Avoiding access conflicts through proactive measures would be consistent with citizenship theory. Legislation has given force to the rights of individuals to be free from discrimination so that "each person feels a part of the community and able to contribute fully to the development and well being of the community and Province."¹⁴³ However, in terms of the systemic discrimination problem (i.e. access) faced by persons with disabilities, that citizenship intent inherent in the legislation is not effected in practice. Therefore, the legislation is not effective in assuring citizenship for persons with disabilities. However, by shifting the legislative emphasis from adjudication to regulation, the access issue can be addressed

¹⁴² Sarah Yates, Abilities, "An Accessible House of Our Own", (Toronto, Fall 1995), pp 45 - 48.

¹⁴³ Human Rights Code, R.S.O. 1990, Chapter H.19, Preamble.

proactively, instead of in an adversarial process where the legislated right is continually the source of debate.

Legislation is intended to affect behavioral change(s) in society. If the behaviour desired by the legislation does not occur (e.g. assured access for persons with disabilities), then the legislative framework needs to be assessed to ensure its effectiveness. In turn, if ineffectiveness is shown, alternatives need to be considered.

As will be discussed in the next chapter, Section 34(1)(a) of the Human Rights Code may provide some guidance in this area, in that it suggests that due deference should be had to "more appropriate Act(s)." ¹⁴⁴ The issue is whether those other "Acts" are currently sufficient, or can be modified to become "more appropriate" for assuring access. In practice, there is already some deferral of human rights issues to other forums, such as the Labour Relations Board, in terms of claims of discrimination in labour relations. This has been given the effect of legislation, ¹⁴⁵ where this legislation incorporates anti-discrimination principles into the operation of a union in representing constituent members (i.e. shall not act in a manner that is arbitrary or discriminatory). Practically, based on the writer's own experience and

¹⁴⁴ See Human Rights Code, R.S.O. 1990, Chapter H.19, Section 34(1)(a).

¹⁴⁵ See, for example Labour Relations Act 1995, S.O. 1995, Chapter 1, Schedule 'A', Section 75.

recommendations, some human rights complaints have been "not dealt with" due to the presence of more appropriate Acts.

If better access is assured, it may be that not only is human rights litigation avoided, but personal injury cases may be averted, if such cases are based on poor access problems. In this regard, the public may see the issue not only as one of right (a right which affects a minority), but as a way of limiting potential personal injury liabilities, and in turn reducing the use of court/judicial resources in this area. While Fiss may criticize ADR as a means of streamlining dockets, it may be that streamlining by institutionalizing conflict avoidance does create social benefits. More in keeping with writers like Michael Hammer, some rethinking is needed as to why we do what we do. Are the implementation methodologies producing the desired outcome envisioned by policy and legislation? Or, in considering the more fundamental questions of citizenship,

We must keep in mind that we are trying to show how the idea of society as a fair system of social cooperation can be unfolded so as to find principles specifying the basic rights and liberties and the forms of equality most appropriate for those cooperating, once they are regarded as citizens, as free and equal persons.¹⁴⁶

¹⁴⁶ John Rawls, Political Liberalism (New York: Columbia University Press, 1993) p.27.

Chapter 6 - Land Use Planning: A Proactive Means to Assuring Access

In Canada, the constitutional authority for land use planning (and indeed municipal control) rests with the provinces.¹⁴⁷ Each province in turn has enacted land use planning legislation. In Ontario, this means the Planning Act. However, there are also many special acts and policy statements which prescribe consideration for many applications. For example, Ontario has the Environmental Assessment Act and the Niagara Escarpment Planning and Development Act as specialty legislation, and the Foodland Guidelines and Mineral Aggregate Resource policy statements. The former are used by the province (along with the others legislative tools, such as the Municipal Act and Ontario Municipal Board Act) to oversee and override the planning functions delegated to the municipal level of government. The latter are examples of guides to the municipalities in their exercise of their delegated authority.

However, with changing public agendas, land use planning has been very capable of adapting to specific issues. This is most evident in the area of natural resource protection and management. For example, the Ontario government in 1973 enacted the Niagara Escarpment Planning and Development Act, as a way of dealing with conflicting views on the future of development activity in and around the natural resource known as the Niagara Escarpment. This Act provides for the creation of a policy framework (through extensive public consultation and subject to regular review

¹⁴⁷ Constitution Act, 1867, Section 92.

and update to assure adherence to potential changing circumstances) for dealing with conservation and development; a specialized body, the Niagara Escarpment Commission (NEC) to be the decision maker in such applications; and an accountability mechanism, in the form of a specialized administrative tribunal to oversee the decisions of the NEC.¹⁴⁸

Utilizing stated objectives (and related implementation policies and criteria), development proposals are assessed. For example, one such objective reads as follows: To encourage compatible recreation, conservation and educational activities."¹⁴⁹ The use of the word "compatible" is clear indication of the intent to avoid conflict.

One area of conflict (or potential conflict) that prompted the creation of the NEC was that, given the multitude of municipal jurisdictions that affected the Escarpment, it was felt to be in need of protection. To do this a mechanism was needed so that decisions concerning development in that geographic area were made consistently. With 31 local municipalities, four counties and four regional municipalities, the concern for variations in development patterns from one municipality to the next meant that the use of one body (i.e. NEC) applying consistent criteria would avoid a

¹⁴⁸ See Niagara Escarpment Planning and Development Act, R.S.O. 1990, Chapter N.2.

¹⁴⁹ Government of Ontario, *Niagara Escarpment Plan* (Toronto, 1994) p.11.

"patchwork" approach to development where one municipality may have a conservationist approach and the neighbouring municipality may be pro-development. By giving protection of the Niagara Escarpment the legislated mandate, the patchwork approach was avoided along the 740 kilometers of Niagara Escarpment environs, from Queenston in the south to Tobermory in the north.

An interesting aspect of planning legislation is that it allows conditions to be applied to individual circumstances. However, where such conditions are not identified, they cannot be given force through a planning decision. This may be a tool which is currently under-utilized for affecting other public interests, such as access for persons with disabilities.

While the intent is to avoid future conflict, conflict may still arise, yet it will be considerably focussed and guided by the regulatory framework. Also, rules of natural justice are applied, and the decisions made and procedures followed by the NEC and the appeal tribunal (i.e. Niagara Escarpment Development Control Hearings) can be reviewed in Ontario courts. The result is that most issues are resolved by the regulatory and policy framework, whose underpinning is the objective of avoiding (or at least minimizing) conflicts between development pressure and the need to preserve the integrity of the natural resource. Sometimes conflict avoidance in this area means denying approval for development due to concerns over unavoidable negative effects of development on escarpment lands; sometimes it means imposing conditions

on development activity such that negative impacts on the natural environment are avoided; and at other times, it means approval after determining that a development proposal will not adversely affect the escarpment. So effective is this framework that the United Nations Educational, Scientific and Cultural Organization (UNESCO) has recognized the Niagara Escarpment (and the protection measures established therefor) as a Man and the Biosphere Reserve,¹⁵⁰ which recognizes the balance between human and natural environments. Essentially, this is recognition of conflict avoidance, although expressed in different language.

While it may be the opinion of some that there is some imposition on individual rights inherent in land use planning, the corollary is that planning is in place to protect individuals and their property from conflict. Further, the use of specialized (and often very restrictive) planning bodies is not specific to Canada - many countries use them. The NEC was fashioned after similarly-mandated bodies in the United States, particularly the California Coast Commission and the New Jersey Pinelands Commission.

Planning can also be site specific, utilizing site plan controls and very stringent zoning requirements.¹⁵¹ It also allows for the enforcement of related mandates, such as traffic control or emergency considerations. For example, site planning may require

¹⁵⁰ *Ibid.*, p.2.

¹⁵¹ See for example The Planning Act, 1992 S.O. 1992, Chapter P.13.

proper entrance and egress from a new development (e.g. shopping plaza). In doing so, separations from other accesses/egresses will be prescribed, emergency considerations will be accommodated and aesthetic questions can be addressed to assure compatibility with visual attractiveness standards. As a result, planning access and egress can reduce motor vehicle accidents, thus avoiding the legal processes associated with resolving such conflicts.

Land use planning and anti-discrimination principles/laws/policies are compatible concepts, both in theory and in practice. Pursuant to the Supreme Court of Canada decision in Bell v. The Queen¹⁵², which is a standard applied across Canada, land use planning is about "use", not "user". Perhaps the best way of illustrating this is to connect the current practical application of planning principles and policies to grounds of discrimination. Before providing the illustration, it is necessary to recall the point made in Chapter 2 that the province uses administrative tribunals (among other tools) to exert provincial control over municipal activities, to assure compliance with provincial requirements. These requirements can take a variety of forms, and in the area of land use planning, that includes the use of provincial policy statements (e.g. affordable housing, foodland guidelines) and ministerial directives (e.g. group homes be permitted in any residential area). Operationally, if a municipality was to neglect the application of a provincial standard/policy/directive in exercising the delegated planning function, the appeal body (e.g. OMB) would review the local decision for

¹⁵² Bell v. The Queen, [1979] 2 S.C.R. 212.

compliance with the provincial requirement, and can render a decision that reflects the provincial interest (thus assuring provincial control).

In terms of anti-discrimination principles, there are several examples of provincial policies and directives that help to assure non-discriminatory land use decisions. For example, all municipal zoning by-laws include a statement that "group homes" must be permitted in all residential zoning categories. This wasn't by way of choice, rather it is pursuant to a provincial directive regarding group homes. The effect of the directive is the recognition that the group home is a residential use, regardless of who (or what group) may be housed therein. From an anti-discrimination standpoint, this is critical, because the "groups" normally associated with group homes are also similarly identified by "grounds" in human rights laws. For example, a half-way house for ex-offenders coincides with the ground of "record of offences". In land use law and practice, the issue is not the identification of the inhabitants, rather what activity or use is being engaged in (e.g. residential or commercial).

The same analogy can be applied to other types of group homes, such as satellite homes for seniors (i.e. identified by a ground of "age") or for mental or learning disabled, or hospices for the terminally ill (i.e. all of which are under the ground of "handicap" or "disability"). By assuring the inclusion of such uses in a proactive planning fashion, the users do not need to seek the remediation of rights tribunals or courts. If there is a dispute with a municipal planning decision in one of these areas,

the OMB still allows natural justice applications, but with the underlying understanding of assuring the provincial standard.

An overriding directive regarding access for persons with disabilities would have proven useful for avoiding the situation experienced by the Yates family in Winnipeg (see Chapter 5). In that circumstance, the neighbours may have been quieted by having the onus to prove that the renovations did not assure access, as opposed to merely having to show non-compliance with a neighbourhood caveat that was not reflected in municipal zoning. And, the Yates family would not have to draw media attention to their physical limitations, as a way of exacting public empathy for a guaranteed right.

Another example of anti-discrimination principles being practised in land use planning concerns religion. Churches are included under the guise of institutional use. However, there is no requirement that, for example, only Christian places of worship be permitted in certain institutional zones. The use, being the place of worship, is permitted irrespective of the faith/denomination/creed of the users. "Creed" or "religion" is protected in the the *Charter* and rights legislation.

The premise behind the "use" vs. "user" application of planning, is one of inclusion. If, for example, the group home policy was not in effect, there could be effective exclusion of persons by virtue of their personal characteristics. Such exclusion would

be discrimination under the Supreme Court of Canada's definition in Andrews v. The Law Society of British Columbia.¹⁵³

The compatibility of land use law and anti-discrimination law is critical to the issue of assuring physical access for persons with disabilities. The use of land, as seen from the above discussion, is non-exclusionary, once the overriding use is established. However, by not assuring proper access, the non-exclusion principle remains exactly that, a principle, but not a practical consideration. In this regard, there needs to be some exploration of how the land use planning field may be able to reconcile access conflict(s) in the same fashion as it has (for example) for group homes.

As seen in Chapter 5, access disputes are dealt with through the reactive, time-consuming rights tribunals process. Even in light of the recognition of access as a systemic issue, complaints are considered on an individual basis, and are locationally specific. While the Board of Inquiry's order in Elliot v. Epp Shopping Centres¹⁵⁴ identified specifications for a standard parking space for the disabled, there is little coordination (if any) to assure the future application of this standard across the Town of Niagara-on-the-Lake, or across the more than 800 other municipalities in Ontario.

¹⁵³ [1989] 1 S.C.R. at 174.

¹⁵⁴ Elliot v. Epp Shopping Centres, C.H.R.R., Vol.21, Part 4, (January 15, 1995), D/333.

Further, considering the extent of design standards present in the Americans with Disabilities Act, it would appear that there will need to be a great many more Board of Inquiry decisions to come up with specifications that consider all (or even most) access issues. Also, access questions are competing for increasingly scarce Board of Inquiry resources among all other rights legislation issues. It is difficult to accept that this process will ever remedy the systemic access problem. Land use planning and related building code laws are much better suited to proactively deal with this systemic concern. The *Charter* and rights legislation assurances of access for disabled persons demand that an effective mechanism be found.

Before discussing the writer's proposed solution, it would be helpful to discuss the state of planning and building design requirements in Ontario, and how access issues may be already addressed in those areas.

In Chapter 2, it was noted that there is a trend toward grouping like-mandated administrative tribunals together, for efficiency purposes. This includes tribunals concerned with land use and those concerned with equity laws. Concurrently, there has been "streamlining" activity in the exercise of the planning function. In discussing this issue with a practicing planner,¹⁵⁵ it was learned that there are mixed reviews on the effectiveness of the streamlining, but that the planning process itself is

¹⁵⁵ Discussion with Kathy Desjardins, Planner, Regional Municipality of Niagara, May 2, 1996.

being subjected to the same pressures as virtually every area of public administration.

The current government has indicated that the streamlining it would like to see involves making the process easier for the development industry by reducing requirements. It is the position of the writer that to do so in respect to access issues would be long-term economic folly, not to mention poor public service, and most importantly would be a step backward in assuring the citizenship rights of persons with disabilities. The provincial government still has to provide the protections identified in rights legislation. So avoiding the imposition of access standards today only means that the developer could incur a more costly and cumbersome liability problem in the future through complaint process, where rights legislation reigns supreme¹⁵⁶ over other laws or policies.

The developer may think that the relief from being required to make their developments accessible is a cost savings, and in the short term, it possibly would be. However, if future liabilities are incurred as a result of the short term savings, that developer will have been poorly served. This is one of the lessons to be learned from cases like Elliot v. Epp Shopping Centres and Ryan v. Ripplinger, where the respondents in both instances sought the defence of having complied with lesser restrictive zoning or building requirements. In both cases, the rights legislation

¹⁵⁶ Human Rights Code, R.S.O. 1990, Chapter H.19, Section 47(1a) sets out the "paramountcy" of human rights legislation over other general "Acts" of the Province of Ontario.

prevailed and the respondents incurred greater long term costs associated with the remedy (and litigation) than would have been the case by adhering to access standards at the outset.

The other lesson to be learned from those cases is that, had the standards been properly prescribed at the outset, the entire conflicts could have been avoided. Further, if the respondents felt that the standards being applied were onerous or unreasonable in some manner, then it would have been for them to argue through appeals (e.g. in the application of zoning/site planning criteria for parking requirements, appeal is to the OMB) prior to proceeding with an otherwise access-deficient development. The onus would not be on disabled persons to enforce their legislatively established right (as is the current arrangement); rather it would be on the developer to convince the appeal body that they needn't comply with that quasi-constitutional access provision prior to commencing with an inaccessible development.

It is the writer's experience in the field of land use planning that developers simply want to know, at as early a stage as possible, what is required of them to obtain approval to commence with developing. This doesn't require that the developers embrace the rationale for the design standards to be applied, only that they comply.

It was surprising to the writer to discover, through conversations with practicing planners and building officials, how many of them believe that access is already assured through development approvals processes. This was the writer's view before joining the Ontario Human Rights Commission, but that has since changed. The change has been brought about not only through dealing with access complaints, but by working with disabled persons in the community.

The Ontario Building Code provides access requirements as an appendix to the body of that document. Further, like the situation realized in Ryan v. Ripplinger, it is applied selectively (e.g. to public buildings and community centres). Exempt from such requirements in Ontario are restaurants and other service activities, where minimum floor area provisions are not exceeded. It has been the writer's own experience in investigating human rights complaints, that even where compliance with building legislation is met, access is not realized. For example, an indoor mall had a disabled parking space in one location, a curb ramp at the opposite end of the mall from the parking space, an automatic door at the back of the mall, and a disabled washroom downstairs. But it complied with building regulations. Clearly, access was not assured in that instance.

To better understand the relative effectiveness of building legislation in assuring systemic access, the writer interviewed Peter Zein, information and referral officer at

the Niagara Centre for Independent Living.¹⁵⁷ Zein's expertise in the area of access is both professional (with mechanical engineering credentials) and personal (he is a quadraplegic, as the result of a diving accident). His view of the effectiveness of the Building Code provided the writer with valuable insights.

First, Zein feels (as does the writer) that appending access provisions to the Building Code, as opposed to being incorporated into the body of it (where virtually all other standards are expressed) gives the impression of access as a secondary or less serious building requirement. Also, he points out that the standards that are prescribed are not such that "universal" access is not assured. For example, the Building Code requires access ramps to exhibit a rise over run ratio of 12:1 (i.e. 12 metres long for each 1 meter rise or lift). In his words, "that's all right for a strong paraplegic, who can walk upright, but not for wheelchairs." He suggests a ratio of 18:1, which is consistent with barrier-free design standards prescribed by access advocates, in order to assure universal access.

Another problem with the Building Code is that while it may require handicapped washrooms be supplied for the patrons of a service, there is no such stipulation for providing the same for employees of that enterprise. In Zein's view, this does nothing to assure access or full participation in the community as an equal citizen, as

¹⁵⁷ Apart from a direct interview with Mr. Zein on May 2, 1996, the writer and Mr. Zein have collaborated on resolving access complaints (under the Human Rights Code, R.S.O. 1990, Chapter H.19, Sections 1, 2, 5(1) & 9 from 1992 to 1994).

is otherwise given voice in rights legislation,¹⁵⁸ since it would be considered discrimination in respect of employment. It is also contrary to the liberal view of citizenship, which ties economic considerations (e.g. employment) to citizenship.

Remarking on the very current lobby by the Ontario Homebuilders Association to have access requirements removed, Zein claims (as the writer has previously) that this only defers the liability until a later (and more expensive) time. It may be that the home renovations required to make a building accessible, and the business activity generated therefrom, could be an impetus to builders wishing to reserve that more lucrative work for later, according to a self-admittedly cynical Zein. To effect universal barrier-free design standards today, an able-bodied person who may become disabled later in life, or may have mobility impairments caused by aging, would not need to absorb the cost of renovations. Nor would the public purse be burdened either through legal conflict or funding programs to assist in renovating for access.

It is anticipated that in 1997, the Government of Ontario will revise the building regulations. With its decided lean toward reducing the cost of doing business in Ontario, it may be that the homebuilders will succeed, to the detriment of assuring access for persons with disabilities. As stated however, this would only represent a

¹⁵⁸ For example, in the Human Rights Code, R.S.O. 1990, Chapter H.19, Section 5(1), there is protection from discrimination "in respect of employment". As discussed in Chapter 4 herein, failing to provide an accessible workplace is legally classified as discrimination on the ground of disability.

short term reduction, where the long term cost (to builders, public coffers and most importantly, to persons with disabilities) could be much greater.

6.1 Can These Issues Be Reconciled?

The simple answer to this question is yes. Access can be assured at the systemic level, while at the same time reducing pressures on the caseloads of administrative tribunals, particularly rights tribunals. In order to do so, some changes in approach and legislation needs to be carried out.

There are strong reasons for such changes. The Human Rights Code and the protections it provides carry the weight of quasi-constitutional status. The legislative supremacy of those protections is identified in the body of the Human Rights Code at Section 47(1a). Furthermore, the determination of human rights protections is not the sole bastion of rights tribunals. Quite the contrary, it is contemplated that the human rights protections are to pervade other arenas, pursuant to Section 34(1)(a) of the Code. Following that section, the "more appropriate" method for assuring access on a systemic level is through the land use planning and building approvals processes. Planning approvals can incorporate provincial requirements and assure compliance with provincial directions. Planning is a proactive process concerned with minimizing or avoiding conflict. Similarly, building approvals are concerned with minimizing or avoiding health and safety conflicts.

At the initial stage, most land use planning decisions are made at the municipal level.¹⁵⁹ If access concerns are properly dealt with through municipal-level planning approvals, then the access conflict would be avoided. However, where there is still a dispute over assuring access (i.e. quality or quantity), then appeals can be accommodated.

The appeal mechanisms provide for *de novo* hearings, where all evidence and argument is considered anew, and where orders can be given that have the force of law. Also, given that rights legislation has supremacy, the appeal bodies in land use planning are as bound to consider the protections provided by rights legislation as are rights tribunals or the courts.

By divesting this protection to the land use field, nothing is lost in terms of assured natural justice, but the onus of proof would change. Instead of disabled persons having to assert (possibly again and again) a right that is otherwise legislated, the onus shifts to the proponents of development to prove that they are somehow not required to meet the access standards (before proceeding with inaccessible development).

¹⁵⁹ One exception, in Ontario, would be decisions concerning development in the defined Development Control area of the Niagara Escarpment Commission.

The Ontario Municipal Board Act outlines the authority of the Ontario Municipal Board (OMB). The OMB's powers of investigation and inquiry are very extensive, and are at least parallel to those afforded the Human Rights Commission in the Human Rights Code. These include: i) availing itself of the services of officers of provincial ministries and/or agencies;¹⁶⁰ ii) securing experts, with technical or special knowledge, "to assist the Board in an advisory or other capacity";¹⁶¹ and, iii) entering property, summoning witnesses and compelling the production of documents.¹⁶² Further, in its capacity in adjudicating in land use and land severance disputes, the OMB has exclusive jurisdiction.

The OMB is not only empowered to apply the provisions of the Human Rights Code (i.e. "special Act"), but also to order a remedy that would bring the land use decision into compliance with the Code. This could include the ordering of proper access (for reasons related to Code grounds, including disability or age) while at the same time establishing appropriate case precedents for application in other land use disputes. By comparison, a Board of Inquiry under the Human Rights Code cannot make orders in the OMB's exclusive jurisdiction. Also, assuming the "expert" argument in favour of utilizing administrative tribunals (as discussed in Chapter 2) applying access standards in land use planning and design, the OMB is better suited to this activity because its

¹⁶⁰ Ontario Municipal Board Act, R.S.O. 1990, Chapter O.29, Section 21.

¹⁶¹ *Ibid.*, Section 27(1).

¹⁶² *Ibid.*, Section 53 (a to e), inclusive.

expertise is in land use, which is not the expertise of rights tribunals. While there may be a concern that OMB tribunal chairpersons may not be as committed to human rights as human rights Board of Inquiry chairpersons, this would be kept in check by the potential of appeals to the courts on alleged errors of fact or law.

But how can the OMB (and/or municipal planning authorities) apply access standards if current standards are deficient or not defined at all? This is one area where some legislative change is needed. However, much of the work is already done. In terms of legislative change, the Planning Act will require recognition of the importance of access as a planning consideration for any approval body. This could be strengthened by the use of mandatory language such as "must" or "shall" instead of loose and subjective terms like "have regard to" or "may consider". The distinction between the use of mandatory or subjective language already exists in planning legislation and case law.

Next, adoption of regulations similar to those found in the Americans with Disabilities Act is needed. The legislation can refer directly to the regulations in guiding municipal and administrative tribunal planning determinations. Technology allows ready access to design standards, even if voluminous, so the use of computer aided design systems could incorporate those design standards directly, without the designer needing an intimate knowledge of the breadth and scope of the specifications.

What about existing older, inaccessible development? In planning law, like most others, retroactivity is seen as negative or unreasonable. Land use law even recognizes "existing uses" or "legal non-conforming" standards as being acceptable. However, the intent for such uses is that they eventually cease, or be brought into conformity. This is usually done at a time of rezoning, or perhaps upon the transfer of a property from one ownership to another. If access standards become the norm, then older uses (or access-deficient properties) could be made accessible in due course. This could also be effected in other related regulatory frameworks, such as when a business licence is sought or up for renewal, or if a liquor licence is being requested. Imposing access standards at those times could be incorporated as a cost of business, instead of a cost to the public purse or to the disabled.

Finally, there is a distinction between facilities and buildings open to the public and private homes or clubs. It is not suggested that the legislation be extended to private homes. However, the idea that currently able-bodied people may become mobility impaired in later life due to accident, sickness or age means that even private home construction is affected, either at new construction or renovation stages. Also, a private residence may be offered for rent. To exclude a person with a disability from renting a home, because of a lack of access, would be subject to a challenge of discrimination on the ground of handicap in the area of housing accommodation. For a "private" club, the legislation provides protection from discrimination in the area of goods, services and facilities, which includes clubs. Essentially, while there may be

no need for many private homes to be made accessible, the legislation reaches further than people think. While it may not be applicable today, a change in circumstances (e.g. owner-occupied home to renter-occupied, or a house is converted to a group home or student residence) may make the legislation applicable at a future date.

Chapter 7 - Conclusions

Conclusions and Recommendations

In order for persons with disabilities and mobility impairment problems (including the elderly) to be able to function as equal citizens, the physical barriers to participating in either political, social, economic or cultural aspects of citizenship, must be removed.

Administrative tribunals represent a part of the justice system. They adjudicate in matters such as those affecting social entitlements of citizenship (e.g. social assistance benefits), employee/employer relations, equity and human rights issues and the conflict avoidance/minimization field of land use planning. However, in the policy area of assuring physical access for persons with disabilities and mobility impairments, the current methods do not produce that end. The current adversarial, reactive and patchwork approach utilized in human rights tribunals does not address access as a systemic problem. Without access, there is a large portion of the population that is not enjoying the same level of citizenship as the able-bodied population.

The trends affecting administrative tribunals are symptomatic of public and judicial administration issues in general. Doing more with less, sharing resources and combining responsibilities are all common approaches being taken and considered.

The whole field of alternative dispute resolution is changing the way we approach the resolution of conflict, whether it is in the courts, administrative tribunals, or in culturally specific circumstances. However, the application of ADR has been somewhat limited. It has included: an alternative venue for considering the dispute; settlement or resolution between the parties instead of judicial determination; or in the case of criminal matters, the use of plea bargaining or culturally-specific remedy processes, such as the Aboriginal sentencing circles. However, virtually unexplored is the principle of dispute avoidance: the alternative to the dispute is no dispute. This is a concept that has great potential for application, especially where there are pressures to reduce public costs associated with disputes, where those with the least resources may become further marginalized, and where the assurance of a constitutional right may be at risk because of cost pressures. Doing more with less does not mean doing less, it means rethinking ways of doing things to see if those methods can be changed to be more effective and efficient.

In any generic review of policies and practices, there is a need to extend the focus beyond how to conduct existing processes better. It also should ask the more

important and prior question, that is, what is the intended outcome of this policy/program/legislation?

Access assurance is exactly that, that access is assured, not some form of adversarial dispute resolution process. In the context of this study, it must be remembered that the goal is not to find a better adversarial process for assuring access, rather a more effective, cost efficient and dignified method of assuring access. The current trends in administrative justice agency reform would indicate that such efforts are guided by an assumption that the current adversarial processes are appropriate (presumably because that is how our society generally understands conflict resolution). Using the mindset of people like Michael Hammer and Geoffrey Hazard, the review should first concentrate on asking why a certain activity is undertaken, before assuming that current methodologies are appropriate or the only ones available to meet the objectives. In this regard, true alternatives can be identified.

When applied to citizenship questions, in terms of enabling citizens to be free and equal persons in both word and deed, and consistent with John Rawls' "justice as fairness" concept,

... the test is that of reflective equilibrium: how well the view as a whole articulates our more firm considered convictions of political justice, at all levels of generality, after due examination, once all adjustments and revisions have been made. A conception of justice that meets this criterion is that

conception that, so far as we can now ascertain, is the most reasonable for
us.¹⁶³

The utilization of land use planning as a means of effecting systemic access, by employing dispute avoidance principles, is the way to achieve that reflective equilibrium.

The critical consideration in any such review is that all relevant persons be canvassed for their views. There cannot be disassociation of policy from implementation. It is all well and good to discuss lofty policy ideas, but if the methods of approaching the implementation of those ideals are ineffective, then the importance of the policies is diminished. In the area of assured legislative rights, this connection between ideal and practice is even that much more important, as legislation seeks to change behaviour. The policy drafters, the implementers and adjudicators all need not only be cognizant of how they may be able to do more with less, but why they are engaged at all.

Technology has resulted not only in increased mobility of persons with disabilities, but has added impetus to their expectations in terms of exercising full citizenship. Other technology can also be used to convey access design standards to developers and planners and building officials, and can be an effective tool in a proactive dispute

¹⁶³ John Rawls, Political Liberalism (New York: Columbia University Press, 1993) p.28.

avoidance process. The extensive capacities of new technologies means that previous limitations are being overcome.

The rationale found in this study could be readily applied to many other areas. The only limit on the extent of the application of this rationale is the collective imagination of persons involved with any particular policy field. Coordination of interests can be effected. For example, the new trend toward requiring welfare recipients to identify themselves by fingerprinting is a method of reducing welfare fraud. The program is intended to benefit people in need, not the criminal element. Another novel application of conflict avoidance strategy is the recent program initiated in Ontario where driver's licenses are removed from people who fail to meet their family support payment obligations. This program is intended to curb public spending and judicial efforts aimed at chasing such delinquent persons and to effect greater independence for those who are to receive support. The same rationale could apply to many policy and program initiatives and, undoubtedly, asking those directly involved in program delivery would assist in identifying a wealth of more effective and cost-efficient methodologies. They can help to identify true alternatives, the aims of which are to better assure that policy intent is realized in practice.

Bibliography

Articles and Periodicals

Addario, Lisa, *"Women Shouldn't Bear the Brunt of Legal Aid Cuts"*, Toronto Star September 2, 1995.

American Judicature Society, Judicature, *"Special Issue: Alternative Dispute Resolution and the Courts"*, Feb.- March 1986.

Bailey, Martha J., *"Unpacking the Rational Alternative: A Critical Review of Family Mediation Movement Claims"*, 8 Canadian Journal of Family Law 61 (1989).

Bendall, Lisa, *"Is Your Business Counting on Customers With Disabilities?"*, Toronto Star, May 29, 1995.

Broderick, Raymond J., *"Court-Annexed Compulsory Arbitration Is Providing Litigants with a Speedier and Less Expensive Alternative to the Traditional Courtroom Trial"*, 75 Judicature 41-44 (June/July 1991).

Canadian Human Rights Reporter, (Vancouver, B.C.: 1989 - 1995).

Doe, Tanis, *Review, Abilities*, (Toronto, Fall 1994).

Downey, Donn, *"Ontario Backs New Study to Resolve Disputes Faster"*, (Toronto) Globe and Mail, March 28, 1990.

Eisele, G. Thomas, *"The Case Against Court-Annexed ADR Programs"*, 75 Judicature 34-40 (June/July 1991).

Fennel, Tom, ed., *"Orange County Sees Red"*, Maclean's, (Toronto, April 10, 1995).

Fine, Sean, *"Squads of Judges Urged for Backlog"*, (Toronto) Globe & Mail, March 10, 1995.

Fiss, Owen M., *"Against Settlement"*, 93 Yale Law Journal 1073 (1984).

Globe & Mail, *"Group Battling Rights Changes"*, Toronto, April 17, 1996.

Gwyn, Richard, *"Disabled Need Opportunity to Become Full Citizens"*, Toronto Star, October 5, 1994.

Hamilton Spectator, May 10, 1996.

Hammer, Michael *"Reengineering Work: Don't Automate, Obliterate"*, 68 Harvard Business Review 104-112 (July/Aug 1990).

Harrall, Robert C., *"Court Records Management: 'The Mitten' Revisited"*, 2 Justice System Journal 77 (Spring 1976).

Hazard Jr., Geoffrey C., *"Authority in the Dock"*, 69 Boston University Law Review 469-76 (1989).

Hazard Jr., Geoffrey C. and Paul D. Scott, *"The Public Nature of Private Adjudication"*, Yale Law & Policy Review, (Vol. 6:42, 1988).

Human Resources Development Canada, *"Accessible Workplaces"*, Disability Today, (Summer, 1995).

Judges' Journal, Special Issue, *"What's New in Court Technology"*, Vol. 32/3, (Summer 1993).

Keegan, Judith M., *"The Peacemakers: Biblical Conflict Resolution and Reconciliation as a Model Alternative to Litigation"*, Missouri Journal of Dispute Resolution, Vol. 1987, (1987).

McThenia, Andrew W., and Thomas L. Shaffer, *"For Reconciliation"*, 94 Yale Law Journal 1660-68 (1985).

Mecklenburg County Bar, (report of) *"Mandatory Alternative Dispute Resolution in the District and Superior Courts"* conference, (Charlotte, N.C., May 1994).

Merry, Sally and Susan Sibley, *"What Do Plaintiffs Want? Reexamining the Concept of Dispute"*, 9 Justice System Journal 151 (1984).

Nader, Laura, *"The ADR Explosion - The Implications of Rhetoric in Legal Reform"*, Vol. 8 Windsor Yearbook of Access to Justice 269-91 (1988).

National Geographic Society, National Geographic, Vol. 189, Nos. 2 - 6, inclusive, (Washington, D.C., February - June, 1996).

National Institute for Dispute Resolution, *"Court-Ordered Arbitration Issue: A Report of the First National Conference on Court-Ordered Arbitration"*, Dispute Resolution Forum (Washington, D.C., August 1985).

Nemeth, Mary, *"Circle of Justice"*, Maclean's, (Toronto), September 19, 1994, p.53.

Network for Community Justice and Conflict Resolution, *"Mediation: No Winners, No Losers"*, Liaison (Kitchener, January 1987).

Now, *"Decommissioning Human Rights"*, (Toronto, October 5-11, 1995).

Pearson, Jessica, *"An Evaluation of Alternatives to Court Adjudication"*, 7 Justice System Journal 420 (1982).

Pound, Roscoe, *"The Causes of Popular Dissatisfaction with the Administration of Justice"*, address before the American Bar Association, St. Paul, Minn., 1906 (American Judicature Society reprint).

Toronto Star, *"Rights Body Wronged"*, April 28, 1996.

Toronto Sun, *"Disabled Get Access to the Beach"*, January 3, 1996.

Young, Carol Jean and Brian Kleiner, *"The Americans with Disabilities Act and the Responsibilities of an Employer"*, Equal Opportunities International, Vol.14, Number 1/2, 1995.

Books and Component Parts of Books

Beiner, Ronald, Theorizing Citizenship, (New York: SUNY Press, 1995).

Beiner, Ronald, What's the Matter With Liberalism?, (Berkeley, Ca.: University of California Press, 1992).

Carbonneau, Thomas E., Alternative Dispute Resolution: Melting the Lances and Dismounting the Steeds, (Urbana and Chicago, Illinois: University of Illinois Press, 1989).

Crow, Catherine, Stolen Past, Shattered Futures: Aboriginal Justice in Canada, M.A. Thesis, Department of Politics/Judicial Administration, Brock University (St. Catharines, Ontario, August 1994).

Driedger, Diane, The Last Civil Rights Movement, (New York: St. Martin's Press, 1989).

Ignatieff, Michael, Blood & Belonging: Journeys Into The New Nationalism, (Toronto: Viking, 1993).

Keene, Judith, Human Rights in Ontario, (Toronto: Thomson Canada Limited, 1992).

Kymlicka, Will, Recent Work in Citizenship Theory, for Multiculturalism and Citizenship Canada, (Ottawa, September, 1992)

Macauley, Robert W., Practice and Procedure Before Administrative Tribunals (Toronto: Carswell, 1988).

Miller, Perry S., and Carl Baar, Judicial Administration in Canada, (Kingston and Montreal: McGill-Queen's University Press, 1981).

Parker Follett, Mary, *"The Process of Control"*, in Luther Gulick and Lyndall Urwick, Papers on the Science of Administration, (1937).

Rawls, John, Political Liberalism (New York: Columbia University Press, 1993).

Rosen, Philip, Margaret Young and William R. Young, Human Rights And Democracy: The Role of the Commonwealth, for the Library of Parliament, Minister of Supplies and Service (Ottawa, 1992).

Russell, Peter The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson, 1987).

Shklar, Judith, Men and Citizens: A Study of Rousseau's Social Theory (Cambridge: Cambridge University Press, 1969).

Solomon, Maureen and Douglas K. Somerlot, Caseflow Management in the Trial Court: Now and for the Future (Chicago: American Bar Association, 1987).

Stowe, Harriet Beecher, Uncle Tom's Cabin (New York: Books Inc., 1922).

Stumpf, Felix, Inherent Powers of the Courts: Sword and Shield of the Judiciary (National Judicial College, 1994).

Tannis, Ernest G., *Alternative Dispute Resolution That Works!* (North York,: Captus Press, 1989).

The Concise Oxford Dictionary (Avon, Great Britain: Oxford University Press, 1989).

The Oxford Large Print Dictionary (Toronto: Oxford University Press, 1991).

Young, Iris Marion, Justice and the Politics of Difference (Princeton N.J.: Princeton University Press, 1990).

Case law

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143.

Barber v. Sears Canada, et al, 22 C.H.R.R. D/409 (March 14, 1993) and D/415 (May 3, 1994).

Elkas v. Blush Stop Inc. (1994), 25 C.H.R.R. D/10.

Elliot v. Epp Centres Ltd., (1993), 21 C.H.R.R. D/333.

Hancock v. Shreve, (Ontario Court, General Division) 21 C.H.R.R. D/146.

Moge vs Moge, [1992] 99 D.L.R. (4th) 456-504.

Ouimette v. Lily Cups Ltd., (1990), 12 C.H.R.R. D/19.

R. v. Askov, et al, [1990] 74 D.L.R. (4th), 355 [SCC].

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R., 295.

Ryan v. Ripplinger, [1993] C.H.R.R., Vol.20, D/427.

Shreve v. City of Windsor, et al, 17 C.H.R.R. D/256 (June 25, 1992) and 18 C.H.R.R. D/363 (March 3, 1993).

Legislation and Government Publications

Canada, House of Commons, Bill C-78: An Act to Amend Certain Acts with respect to Persons with Disabilities, 1992.

Canada, Government of, Persons with Disabilities in Canada 1986: Statistics and Bibliography, (Ottawa: Supply and Services Canada, 1993).

Canada, Government of, The Road to Accessibility: An Inquiry into Canadian Motor Coach Services, (Ottawa: Supply and Services Canada, 1993).

Constitution Act 1982.

Individual Rights Protection Act, R.S.A. 1990.

Ontario, An Act to Repeal the Employment Equity Act, 1995, S.O. 1995.

Ontario, Building Code Act 1992, S.O. 1992, Chapter 23.

Ontario, Consolidated Hearings Act, R.S.O. 1990, Chapter C.29.

Ontario, Employment Equity Act 1993, S.O. 1993, Chapter 35.

Ontario, Environmental Assessment Act, R.S.O.1990. Chapter E.18.

Ontario, General Welfare Assistance Act, R.S.O. 1990, Chapter G.6.

Ontario, Family Benefits Act, R.S.O. 1990, Chapter F.2.

Ontario, Guide to Agencies Boards and Commissions, Toronto, 1994.

Ontario, Human Rights Code, R.S.O., 1990, Chapter H.19.

Ontario, Labour Relations Act, 1995, S.O. 1995, Chapter 1, Schedule A.

Ontario, Landlord and Tenant Act, R.S.O., 1990, Chapter L.7.

Ontario, Municipal Act, R.S.O. 1990, Chapter M.45.

Ontario, Niagara Escarpment Planning and Development Act, R.S.O. 1990, Chapter N.2.

Ontario, Ontario Municipal Board Act, R.S.O. 1990. Chapter O.28.

Ontario, Statutory Powers and Procedures Act, R.S.O. 1990, Chapter S.22.

Ontario, The Planning Act, 1992, S.O. 1992, Chapter P.13.

Ontario Human Rights Commission, *Case Management Plan Report for Fiscal 1994/95*, (Toronto, 1995).

Ontario Human Rights Commission, *Procedures Manual, 1992*, (Toronto, 1992).

Ontario Human Rights Commission, *Report of the Staff to the Commission for the Period Ending December 31, 1995*, (Toronto), March 1996.

Ontario Legislature, Bill 168, a.k.a. "Ontarians with Disabilities Act (Bill)".

Ontario Legislature, Standing Committee on Administration of Justice, Alternative Dispute Resolution (Toronto, 1990).

Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1: The Justice System and Aboriginal People, (Winnipeg, 1991).

United States, Government of, Americans With Disabilities Act, Department of Justice, Office of the Attorney General, 1990.

Washington, State Of, *"1993 Annual Report on Dispute Resolution Centres"*, (Olympia, Washington, March 1994).

Miscellaneous

Canadian Bar Association Task Force on Gender Equality in the Legal Profession (The Hon. Bertha Wilson, Chair), Touchstones for Change: Equality, Diversity and Accountability, (Ottawa: Canadian Bar Association, August 1993).

Ianni, R.W., Report of the Task Force on Paralegals, (Toronto: Ontario Ministry of the Attorney General, 1990).

Illinois Department of Commerce and Community Affairs, *"Illinois 1996 Visitors Guide"* (Chicago, Ill., 1996).

Mahoney, Barry, *Review and Recommendations Concerning Case Management Pilot Projects in the Province of Ontario*, unpublished report November, 1992.

National Council of Welfare, Legal Aid and the Poor (Ottawa, Winter, 1995).

Niagara Centre for Independent Living, *Newsletter*, (Welland and St. Catharines), from Vol.5 No. 4, Autumn 1993 to Vol.8 No.2, June 1996, inclusive.

Priest, Margot, *"Structure and Accountability of Administrative Tribunals"*, in Special Lectures of the Law Society of Upper Canada 1992: Administrative Law, pp. 11-62.

Priest, Margot, *"Fundamental Reforms to the Ontario Administrative Justice System"*, Draft document, prepared for the Access to Civil Justice Project, (Ottawa, 1995).

Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action (Ottawa: Canadian Bar Association, August 1988).

Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective (Ottawa: Canadian Bar Association, 1989).

Robson, Patrick, Regional Niagara Debenture Issuance Function, senior research work, Ryerson Polytechnical Institute, (Toronto, 1984).

Robson, Patrick, Seminar notes from POL5P56 and POL5P58, Professor Carl Baar, Brock University, St. Catharines, Sept. 1994 - April 1995.

Selected Papers from the Fourth National Court Technology Conference (CTC-4), Nashville, Tenn., October, 1994.

Society of Ontario Adjudicators and Regulators (S.O.A.R.) *First Principles of Administrative Justice*, (Toronto, 1995).

United Nations, *The Universal Declaration of Human Rights*, (New York, N.Y., December 10, 1948).